(23,882)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 268.

E. L. BRAND, JR., AND E. BELLE BRAND ATWELL, AS SURVIVING EXECUTORS OF THE ESTATE OF EDWIN L. BRAND, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE UNION ELEVATED RAILROAD COMPANY, THE LAKE STREET ELEVATED RAILROAD COMPANY, THE SOUTH SIDE ELEVATED RAILROAD COMPANY, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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1 At a Supreme Court Begun and Held at Springfield on Tuesday, the Second Day of April, in the Year of Our Lord One Thousand Nine Hundred and Twelve, within and for the State of Illinois.

Present:

The Honorable Orrin N. Carter, Chief Justice.
Honorable James H. Cartwright, Justice.
Honorable William M. Farmer, Justice.
Honorable Frank K. Dunn, Justice.
Honorable John P. Hand, Justice.
Honorable Alonzo K. Vickers, Justice.
Honorable George A. Cooke, Justice.
William H. Stead, Attorney General.
Warren C. Murray, Marshal.

Attest:
J. McCANN DAVIS, *Clerk.*

Be it remembered, to-wit, on the Twenty-fifth day of May, A. D. 1912, the same being one of the days in vacation after the term of Court last aforesaid, a record of the proceedings in the Superior Court of Cook County and in the Appellate Court for the First District was filed by Appellants Ella A. Brand, et al., in the office of the Clerk of the Supreme Court in words and figures following, to-wit:

2 16414. 31.

8367. "A."

RECORD FROM SUPERIOR COURT OF COOK COUNTY TO SUPREME COURT.

Gen. No. 225,611.

ELLA A. BRAND et al., etc.,
vs.
THE UNION ELEVATED RAILROAD COMPANY.

Filed May 25, 1912. J. McCan Davis, Clerk of Supreme Court.
Filed Jan. 12, 1910. J. McCan Davis, Clerk of Supreme Court.
Filed Appellate Court, Feb. 21, 1910. Alfred R. Porter, Clerk.
Filed May 25, 1912. J. McCan Davis, Clerk Supreme Court.

H. S. Mecartney, Att'y.

3 *Placita—Superior Court of Cook County.*

UNITED STATES OF AMERICA,
State of Illinois, County of Cook, ss:

Pleas before the Honorable Marcus Kavanagh, one of the Judges of the Superior Court of Cook County, in the State of Illinois, Holding a Branch Court of said Court, at a regular term of said Superior Court of Cook County, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the Sixth day, of December, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States of America the one hundred and thirty-fourth.

Present:

The Honorable Marcus Kavanagh, Judge of the Superior Court of Cook County.
John E. W. Wayman, State's Attorney.
Christopher Strassheim, Sheriff of Cook County.

Attest:
CHARLES W. VAIL, *Clerk.*

Be it remembered that heretofore, to-wit, on the 2nd day of October, A. D. 1902, a certain Præcipe was filed in the office of the Clerk of said Court, in words and figures following, to-wit:

Præcipe—Superior Court.

Superior Court of Cook County, November Term, A. D. 1902.

STATE OF ILLINOIS,
County of Cook ss:

ELLA A. BRAND, E. L. BRAND, JR., and E. BELLE BRAND, Executors and Trustees under the Last Will of Edwin L. Brand, Deceased, Plaintiffs,

VS.

THE UNION ELEVATED RAILROAD COMPANY, THE LAKE STREET Elevated Railroad Company, The South Side Elevated Railroad Company, The Northwestern Elevated Railroad Company, The Metropolitan West Side Elevated Railroad Company, Defendants,

Damages $25,000.00.

4 The Clerk of said Court will issue a Summons in the above entitled cause to said Defendant in a Plea of Trespass on the case to the damage of said Plaintiff in the sum of Twenty five thousand dollars, direct the same to the Sheriff of said Cook county to

execute and make it returnable to the November term of said Court, A. D. 1902.

HARRY S. MECARTNEY,
Plaintiff's Attorney.

To John A. Linn, Esq., Clerk.

CHICAGO, Oct. 2nd, 1902.

Thereupon on the same day to-wit, on the 2nd day of October, A. D. 1902 a certain People's Writ of Summons issued out of the Office of the Clerk of said Court and under the seal thereof directed to the Sheriff of Cook County to execute which writ together with the return of the Sheriff thereon endorsed are in words and figures following, to-wit:

Summons—Superior Court.

STATE OF ILLINOIS,
Cook County, ss:

The People of the State of Illinois to the Sheriff of said county, Greeting:

We command you that you summon The Union Elevated Railroad Company, The Lake Street Elevated Railroad Company, The Northwestern Elevated Railroad Company, The South Side Elevated Railroad Company and the Metropolitan West Side Elevated Railway Company, all corporations, etc., if they shall be found in your County, personally to be and to appear before the Superior
5 Court of Cook County, on the first day of the term thereof, to be holden at the Court House, in the City of Chicago, in said Cook County, on the first Monday of November next to answer unto Ella A. Brand, E. L. Brand, Jr. and E. Belle Brand, executors and trustees under the last will of Edwin L. Brand, deceased, in a plea of trespass on the case to the damage of said plaintiff, as it is said, in the sum of twenty five thousand dollars.

And have you then and there this Writ with an endorsement thereon in what manner you shall have executed the same.

Witness, John A. Linn, Clerk of our said Court, and the seal thereof, at Chicago aforesaid, this 2nd day of October, A. D. 1902.

[SEAL.] JOHN A. LINN, *Clerk.*

(On the back appears the following:)

Pd. $5.00.

Served this writ on the within named The Union Elevated Railroad Company, a corporation by delivering a copy thereof to W. V. Griffin, Secretary of said corporation this 2nd day of October, 1902.

The president of said corporation not found in my county, also Served this writ on the within named The South Side Elevated Railroad Company, a corporation by delivering a copy thereof to J. H. Glade, Secretary of said corporation this 2nd day of October, 1902.

The President of said corporation not found in my county,
6 also Served this writ on the within named The Lake Street Elevated Railroad Company, a corporation, by delivering a copy thereof to W. V. Griffin, Secretary of said corporation this 2nd day of October 1902.

The President of said corporation not found in my county, also, Served this writ on the within named The Metropolitan West Side Elevated Railway Company a corporation, by delivering a copy thereof to George Higginson, Jr., Secretary of said corporation this 2nd day of October, 1902.

The president of said corporation not found in my county, also Served this writ on the within named The North Western Elevated Railroad Company a corporation, by delivering a copy thereof to W. V. Griffin, Secretary of said corporation, this 2nd day of October 1902.

The president of said corporation not found in my county.

ERNEST J. MAGERSTADT, *Sheriff*,
By JAMES SHERIDAN, *Deputy*.

And afterwards, to-wit, on the 6th day of October, A. D. 1902, a certain Declaration was filed in the office of the Clerk of said Court, in words and figures following, to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 225,611. Term No. 14346.

ELLA A. BRAND, E. L. BRAND, JR., and E. BELLE BRAND, Executors and Trustees under the Last Will of Edwin L. Brand, Deceased,

VS.

THE UNION ELEVATED RAILROAD COMPANY, THE LAKE STREET Elevated Railroad Company, The South Side Elevated Railroad Company, The Northwestern Elevated Railroad Company, and The Metropolitan West Side Elevated Railway Company.

Ella A. Brand, E. L. Brand, Jr., and E. Belle Brand, executors and trustees under the last will of Edwin L. Brand, deceased,
7 plaintiffs in this suit, by Harry S. Mecartney, its attorney, complain of the defendants The Union Elevated Railroad Company, The Lake Street Elevated Railroad Company, The South Side Elevated Railroad Company, The Northwestern Elevated Railway Company, and The Metropolitan West Side Elevated Railway Company, all corporations organized and existing under and by virtue of the laws of Illinois, of a plea of trespass on the case.

For that whereas the said Edwin L. Brand was at the time of the committing of the grievances hereinafter mentioned the owner of the following described real estate, with the buildings thereon and the appurtenances thereto belonging, situated in the City of Chicago, County of Cook and State of Illinois, to-wit:

The north twenty-five (25) feet of Lot five (5) in Block seven (7) of Fractional Section fifteen (15) Addition to Chicago, commonly known as Number 259 Wabash avenue in said City of Chicago; which said premises were at the time aforesaid improved by a five story and basement brick and stone building occupied by the divers tenants of said Edwin L. Brand on short terms and particularly adapted, fitted up and used for business and mercantile purposes and having special value for said uses and purposes; and along, by, and in front of said premises, at the time aforesaid, and long prior thereto, there ran a public street or highway commonly known as Wabash avenue, which said street was on a level grade, open to the sky and unobstructed, and used only for purposes of public travel and traffic along the surface thereof; by means whereof the said premises and said Edwin L. Brand and his said tenants had and enjoyed all those certain street rights easements and privileges which legally appertain and rightfully belong to property abutting public streets in said City of Chicago, entirely free from the obstructions annoyances and disturbances hereinafter complained of; in-
8 cluding the rights and easements of light, air, access, privacy, view, etc., including the free, convenient, uninterrupted and unobstructed means of ingress and egress to and from the said premises by means of said street by wagons and other vehicles, as well as on foot; including the full, free, uninterrupted and unobstructed access to abundant light and air from said street in, to and upon said premises in connection with said street in privacy and quiet, subject only to the ordinary and usual travel and traffic along the surface thereof, as aforesaid, but entirely free from the noises, rumblings, shakings, disturbances, vibrations, dirt, sparks, cinders, gases, etc., hereinafter complained of; which said rights and easements, free and unobstructed as aforesaid, were of great benefit and advantage to the plaintiff and an element of great and special value to said premises; and which said rights and easements the said plaintiff was entitled to have and enjoy forever unobstructed and unimpaired as aforesaid; and thereafter and, on to-wit, December 25, 1900, the said Edwin L. Brand died, leaving a last will, by which all of said decedent's Estate was left to the plaintiffs as Executors and Trustees; that said last will has been duly filed and approved and the plaintiffs were duly appointed and now are the authorized and acting Executors and Trustees under said last will, and are proceeding with the administration of said estate.

Yet the defendants, well knowing the premises, but contriving and wrongfully intending to injure the plaintiffs in their use and enjoyment of said premises and the appurtenances thereunto belonging in connection with said street as aforesaid, and to destroy and greatly decrease the value of said property and plaintiffs' rights and easements therein, did, on to-wit October 3, 1897, and at divers other times subsequent thereto and prior to the commence-
9 ment of this suit, enter upon said Wabash avenue in the City of Chicago, and excavated and tore up the same in front of said premises and built and constructed in and along said highway in front of said premises an elevated railroad structure, permanent

in character, and consisting of stone, iron, steel, wood and other materials, in which iron and steel rails were laid upon wooden ties placed crosswise about six inches apart upon large and heavy horizontal iron girders, elevated at, to wit, twenty (20) feet above the surface of said street, and supported by numerous heavy upright iron posts and columns resting on stone and cement foundations sunk in said street to a great depth; and all so connected and braced as to form the road-bed of an elevated railroad on which ran two or more tracks; and also then and there built and constructed in connection therewith in said street in front of said premises an elevated railway station house, containing rooms for ticket sellers and other employees, news-stands, waiting rooms and other accommodations usual to an elevated railway station, and in connection therewith said defendants then and there also constructed and built long covered platforms and covered iron stairways leading from said station to said street in front of said premises; which said structure was of great height, width and thickness and covered nearly all of said highway in front of said premises and extended for a great distance along said Wabash avenue to the North and to the South and connected with certain other elevated railway structures, in and along divers other streets in said city and thence running to the outlying parts thereof, so that said portion of said structure in front of said premises formed a part of a continuous elevated railway structure; and upon the completion of said elevated railway structure, as aforesaid, the said defendants then and there proceeded to and did operate and from thence hitherto have continued to operate, over and upon and along said elevated railway structure in front of said premises a large number of engines, cars and trains of cars. And by the construction and operation of said elevated railroad as aforesaid, the said defendants permitted and caused to be thrown from said cars and trains and said structure, in, to and upon said premises and said street in front of said premises large quantities of soot, smoke, steam, cinders, sparks, ashes, coal dirt, water, snow, ice, grease, oil and filth; and caused the air in and about said premises to be impregnated with disagreeable and harmful odors, steam, vapors and gases; and caused great noises, rumblings, creakings, uproar and confusion; and disturbed and injured the business and comfort of the said tenants and occupants of said premises in the night time and day time as well; and disturbed and destroyed the privacy and quiet of rooms, offices, apartments, and stores in said building; and caused said building and the earth adjacent thereto to shake, jar, tremble, and vibrate; and by means of the construction and operation of said elevated railroad as aforesaid, the said defendants cut off, impaired and greatly interfered with the said free, convenient, uninterrupted and unobstructed ingress and egress to said premises, darkened said street in front of said premises and adjacent thereto and cut off, impaired and greatly interfered with the view from and the access of light and air to, said premises theretofore had and enjoyed by the owners and tenants thereof; all of which said disturbances and injuries and grievances above complained of, have

continued from and since, towit, said October 3, 1897, hitherto, and have caused and are now causing and will henceforth continue to cause a great and permanent damage and injury to said premises and building and said rights and easements therein, and by
11 means thereof the said real estate has been greatly reduced in market value, towit, in the sum of Twenty-five thousand dollars ($25,000).

And the plaintiffs aver that said defendants became and are bound to make full compensation to plaintiffs for the said loss and damage under the Constitution and Laws of the State of Illinois; but the said defendants, though often requested, have not, nor has any or either of them, paid said loss and damage or any part thereof, but hitherto have wholly neglected and refused and still neglect and refuse to do so, to the damage of said plaintiffs of Twenty-five thousand dollars ($25,000); wherefore they bring this suit.

HARRY S. MECARTNEY,
Attorney for Plaintiffs.

And afterwards, to-wit, on the 3rd day of November, A. D. 1902 a certain Demurrer was filed in the office of the Clerk of said Court in words and figures following, to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

ELLA A. BRAND et al.,
vs.
UNION ELEVATED RAILROAD COMPANY *et al.*

Case. 225611—13346.

Now come the defendants, Union Elevated Railroad Company, The Lake Street Elevated Railroad Company, The Metro-
12 politan West Side Elevated Railway Company, Northwestern Elevated Railroad Company and South Side Elevated Railroad Company, by Clarence A. Knight, their attorney, and defend, etc., when, etc., and say that the said declaration and the matters therein contained, in manner and form as the same are therein set forth are not sufficient in law for the plaintiffs to maintain their aforesaid action, and that they, the defendants, are not bound by law to answer the same, and this the defendants are ready to verify.

And for special causes of demurrer to the said declaration, these defendants show to the Court the following:

1. It is not alleged in said declaration that the building of the railroad and the operation of trains thereon set forth in said declaration in the street upon which plaintiffs' property abuts, is a use of said street inconsistent with its use as a public street and highway.

2. It is not alleged in said declaration, nor are any facts alleged from which it can be ascertained, whether the elevated railroad set forth therein was built for the purpose of being used by these defendants as a street railroad for the purpose of facilitating travel upon the street in which it is built, or as an ordinary commercial railroad.

3. It is not alleged in said declaration that the elevated railroad structure is in any way negligently constructed or the railway operated thereon is in any way negligently operated.

4. The elevated railroad structure is not in said declaration sufficiently described.

5. It is not alleged in said declaration as to whether or not the plaintiffs consented to the construction of said railroad upon the street upon which their property abuts.

13 6. It is not alleged in said declaration that the plaintiffs are the owners of any property rights in any street in which said railroad is built or operated which are appurtenant to their property abutting on said street which have been wrongfully interfered with by reason of the construction of said elevated railroad or the operation of trains thereon.

7. It is not alleged in said declaration that the access to plaintiffs' premises or the ingress and egress to and from plaintiffs' premises is materially interfered with by reason of the construction of said elevated railroad or by reason of the construction and operation of said elevated railroad, nor are any facts alleged in said declaration from which it can be ascertained that the access to said premises or the ingress and egress to and from said premises are materially interfered with by reason of the construction of said railroad, or by reason of the construction and operation of said railroad.

8. It is not alleged in said declaration that the light and air to plaintiffs' premises are materially interfered with by reason of the construction of said railroad or by reason of the construction and operation of said railroad, nor are any facts alleged in said declaration from which it can be ascertained that the said light and air are materially interfered with by reason of the construction of said elevated railroad or by reason of the construction and operation of said elevated railroad.

9. It is not alleged in said declaration in what part of the street said railroad is constructed, how far the nearest portion of the said railroad is from the lot lines of plaintiffs' premises and from the building located thereon, how far the posts supporting the structure are located from the lot lines of plaintiffs' premises and from

14 the building located thereon how many upright columns are placed in said street opposite plaintiffs' premises, or the distance apart of said columns in said street.

10. It is not alleged in said declaration that the said railroad and its appurtenances are so constructed, nor are any facts alleged in said declaration from which it can be ascertained that they materially darken the street in front of plaintiffs' premises.

11. It is not alleged in said declaration that the soot, smoke, steam, vapors, sparks, ashes, coal, dirt, water, snow, ice, grease, oil

or filth, which it is claimed have been cast upon plaintiffs' premises and upon the street in front of plaintiffs' premises by reason of the operation of trains upon said elevated railroad structure, or that the odors, steam, vapors and gases, which it is claimed have polluted the air in and about plaintiffs' premises by reason of the operation of trains upon said elevated railroad structure, have been thrown upon said premises or upon said street, or have permeated the air in greater quantities than they would by the ordinary, prudent and usual operation of said railroad.

12. It is not alleged in said declaration that the defendants are guilty of any negligence in the casting of soot, smoke, steam, cinders, sparks, ashes, coal, dirt, water, snow, ice, grease, oil and filth upon plaintiffs' premises or upon the street in front of plaintiffs' premises, or in allowing odors, steam, vapors and gases to contaminate the air in and about the street and in and about plaintiffs' premises.

13. It is not alleged in said declaration that the noises, rumblings, creakings, uproar and confusion, which it is claimed have been occasioned by the operation of said railroad, are greater than would be occasioned by the ordinary, prudent and usual operation of said railroad.

14. It is not alleged in said declaration that the defendants are guilty of any negligence in the making of any noise in and about the operation of said railroad in the street in front of plaintiffs' premises.

15. It is not alleged in said declaration that the plaintiffs' land and building are materially shaken and vibrated nor is it alleged that the vibration of said building and land, which it is claimed results from the operation of trains upon said railroad, is any greater than would be caused by the ordinary, prudent and usual operation thereof.

16. It is not alleged in said declaration that the defendants are guilty of any negligence in that the operation of trains upon said elevated railroad structure causes the plaintiffs' land and building to shake, jar, tremble and vibrate.

17. It is impossible to ascertain from the declaration whether the damages claimed to have been sustained by reason of the building and operation of said elevated railroad results from other causes than an interference with the privacy and quiet of rooms, offices, apartments and stores in plaintiffs' building for which the plaintiffs are not entitled to recover damages.

18 It is impossible to ascertain from the declaration whether the damages claimed to have been sustained by reason of the building and operation of said elevated railroad result from other causes than an interference with the view from said premises for which the plaintiffs are not entitled to recover damages.

19. It is not alleged in said declaration that the plaintiffs were the owners of the premises described in the declaration at the time of the beginning of the suit herein.

Wherefore, for want of a sufficient declaration in this behalf, these defendants pray judgment and that the plaintiffs may be barred from maintaining their aforesaid action, etc.

CLARENCE A. KNIGHT,
Attorney for Defendants.

16 And afterwards, towit, on the 11th day of November, A. D. 1904, the following proceedings were had and entered of record in said Court, towit:

225,611. Case.

ELLA A. BRAND et al.
vs.
THE UNION ELEVATED RAILROAD COMPANY et al.

On motion of defendants' attorney it is ordered that leave be and is hereby given the defendants to withdraw their demurrers filed herein and leave given the defendants to plead to the plaintiffs' declaration filed herein instanter and it is ordered that the plaintiffs be and they are hereby required to reply thereto within ten days from this date.

And on towit, on the 11th day of November, A. D. 1904, a certain Pleas was filed in the office of the Clerk of said Court in words and figures following, to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

Case. 225,611. 5811.

ELLA A. BRAND et al., Executors, etc.
vs.
THE UNION ELEVATED RAILROAD COMPANY et al.

Now come the defendants, Union Elevated Railroad Company, The Lake Street Elevated Railroad Company, South Side Elevated Railroad Company, Northwestern Elevated Railroad Company and The Metropolitan West Side Elevated Railway Company by Clarence A. Knight, their attorney, and defend the wrong and injury, when, etc., and say that they are not guilty of the supposed grievances above laid to their charge, or any or either of them, in manner and form as the plaintiffs have above thereof complained against
17 them; and of this the defendants put themselves upon the country, etc.

And for a further plea in this behalf the defendants say that the plaintiffs ought not to have their aforesaid action against them, the defendants, because they say that the said plaintiffs are not, nor were they, at the time of the commencement of this suit, the executors and trustees under the last will of Edwin L. Brand, deceased, as by the said declaration is above supposed. And of this the defendants put themselves upon the country, etc.

And for a further plea in this behalf, the defendants say that the plaintiffs ought not to have their aforesaid action against them, the defendants, because they say that at the time of the committing of the grievances complained of in said declaration, the said Edwin L. Brand was not the owner of the premises in said declaration de-

scribed, in manner and form as the plaintiffs have above thereof complained against them, and this the defendants are ready to verify; Wherefore, they pray judgment if the plaintiffs ought to have their aforesaid action against them, etc.

CLARENCE A. KNIGHT,
Attorney for Defendants.

And afterwards, towit on the 18th day of November A. D. 1904 a certain Replication was filed in the office of the Clerk of said Court in words and figures following, towit:

18 STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Case. 225,611—5811.

ELLA A. BRAND et al., Executors, etc.,
vs.
THE UNION ELEVATED RAILROAD COMPANY et al.

And the plaintiffs, as to the pleas of said defendants by them first and secondly above pleaded, and on which they have put themselves upon the country, do the like.

And the plaintiffs, as to the plea of said defendants thirdly above pleaded, say that they, the plaintiffs, by reason of anything in that plea alleged, ought not to be barred from having their aforesaid action, because they say that at the time of the committing of the grievances complained of in said declaration, the said Edwin L. Brand was the owner of the premises in said declaration described; and this the plaintiffs pray may be inquired of by the country, etc.

H. S. MECARTNEY,
For Plaintiffs.

And afterwards, to-wit, on the 23rd day of January A. D. 1905 the following proceedings were had and entered of record in said Court towit:

225,611. Case.

ELLA A. BRAND et al.
vs.
THE UNION ELEVATED RAILROAD COMPANY et al.

On the stipulation of the parties to this suit filed it is ordered that this suit be and is hereby passed to be taken up on five days' notice.

19 And afterwards, to-wit, on the 18th day of March, A. D. 1907 the following proceedings were had and entered of record in said Court, to-wit:

225,611. Case.

ELLA A. BRAND et al.
vs.
THE UNION ELEVATED RAILROAD COMPANY et al.

On the stipulation of the parties to this suit filed it is ordered that said cause be and is hereby passed to be taken up on thirty days' notice.

And afterwards, to-wit on the 18th day of May A. D. 1908 the following proceedings were had and entered of record in said Court towit:

225,611. Case.

ELLA A. BRAND et al., Trustees, etc.,
vs.
THE UNION ELEVATED RAILROAD Co. et al.

On the agreement of the parties to this suit now here made in open court it is ordered that said cause be and is hereby passed to be be taken up on twenty days' notice.

And afterwards, towit, on the 11th day of December A. D. 1908, the following proceedings were had and entered of record in said Court to-wit:

225,611. Case.

ELLA A. BRAND et al., etc.,
vs.
THE UNION ELEVATED RAILROAD COMPANY et al.

On the agreement of the parties to this suit now here made in open court it is ordered that said cause be and is hereby passed to be taken up on twenty days' notice.

20 And afterwards, towit, on the 11th day of November, A. D. 1909, the following proceedings were had and entered of record in said Court to-wit:

225,611. Case.

ELLA A. BRAND et al.
vs.
THE UNION ELEVATED RAILROAD COMPANY et al.

On motion of plaintiff's attorney, it is ordered that leave be, and is, hereby given the plaintiffs to amend their declaration herein instanter and the defendant required to plead thereto within five days from this date.

And on towit on the 11th day of November A. D. 1909 a certain Amendment was filed in the office of the Clerk of said Court, in words and figures following, to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Case No. 225,611. Term No. 275.

ELLA A. BRAND et al., Executors, etc.,
vs.
UNION ELEVATED R. R. Co. et al.

And now come the plaintiffs by Harry S. Mecartney, their attorney, and by leave of court first had and obtained, amend their declaration filed herein as follows:

1. By striking out and omitting from the title of said cause on page one (1) of the declaration the words "and trustees," so
21 that said title of parties plaintiff shall read as follows:

"Ella A. Brand, E. L. Brand, Jr., and E. Belle Brand now Atwell, Executors under the last will of Edwin L. Brand, deceased."

2. By striking out and omitting in line two (2) of page one (1) of said declaration the words "and trustees," so that the first two lines of said declaration shall read as follows:

"Ella A. Brand, E. L. Brand, Jr., and E. Belle Brand now Atwell, Executors under the last will of Edwin L. Brand."

3. By striking out and omitting the last word of line five (5) and the first word of line six (6) both of page three (3) of said declaration, so that lines five, six and seven of said page three of said declaration shall read as follows:

"appointed and now are the authorized and acting executors under said last will, and are proceeding with the administration of said estate."

HARRY S. MECARTNEY,
Attorney for Plaintiff.

And afterwards, towit on the 16th day of November A. D. 1909 a certain Pleas was filed in the office of the Clerk of said Court, in words and figures following, to-wit:

22 STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Case. 225,611—275.

ELLA A. BRAND, E. L. BRAND, JR., and E. BELLE (now ATWELL), Executors under the Last Will of Edwin L. Brand, Deceased,
VS.
UNION ELEVATED RAILROAD COMPANY et al.

Pleas to Declaration as Amended by Amendment Filed November 11, 1909.

First Plea. Now come the defendants Union Elevated Railroad Company, The Lake Street Elevated Railroad Company, South Side Elevated Railroad Company, Northwestern Elevated Railroad Company, and the Metropolitan West Side Elevated Railway Company by Clarence A. Knight, their attorney, and defend the wrong and injury, when, etc., and say that they are not guilty of the supposed grievances above laid to their charge, or any or either of them, in manner and form as the plaintiffs have in their declaration as amended by amendment filed herein on November 11, 1909, above thereof complained against them; and of this the defendants put themselves upon the country, etc.

Second Plea. And for a further plea in this behalf the defendants say that the plaintiffs ought not to have their aforesaid action against them, the defendants, because they say that the said Ella A. Brand, E. L. Brand, Jr., and E. Belle Brand were not at the time of the filing of said amendment filed herein on November 11, 1909, the Executors under the last will of the said Edwin L. Brand deceased, in manner and form as the said plaintiffs have above in that behalf alleged, and this the defendants are ready to verify. Wherefore they pray judgment if the plaintiffs ought to have their aforesaid action against them, etc.

23 Third Plea. And for a further plea in this behalf the defendants say that the plaintiffs ought not to have their aforesaid action against them, the defendants, because they say that the said Ella A. Brand, E. L. Brand, Jr., and E. Belle Brand, as to the several supposed causes of action in the said declaration mentioned, are not now, nor were they ever Executors under the last will of the said Edwin L. Brand, deceased, in manner and form as the said plaintiffs have above in their said declaration in that behalf alleged, and this the defendants are ready to verify. Wherefore they pray judgment if the plaintiffs ought to have their aforesaid action against them, etc.

Fourth Plea. And for a further plea in this behalf the defendants say that the plaintiffs ought not to have their aforesaid action against them, the defendants, because they say that at the time of the committing of the grievances complained of in the said declaration the said Edwin L. Brand was not the owner of the premises in the

said declaration described, in manner and form as the plaintiffs have above thereof complained against them, and this the defendants are ready to verify. Wherefore they pray judgment if the plaintiffs ought to have their aforesaid action against them, etc.

Fifth Plea. And for a further plea in this behalf the defendants say that the plaintiffs ought not further to have or maintain their aforesaid action against them, because they say that prior to the commencement of this suit, to wit, on January 26th. 1901, the last will and testament of the said Edwin L. Brand, deceased, was admitted to record by the Probate Court of Cook County, Illinois, in and by which said last will and testament the said Ella A. Brand, E. L. Brand, Jr., and E. Belle Brand, were nominated as Executors thereof, and afterwards, to-wit, on the day last aforesaid,
24 letters testamentary were issued out of said Probate Court to the persons last named who were by said letters authorized to collect and secure all and singular the goods, chattels, rights and credits which were of the said Edwin L. Brand at the time of his decease, and to do and perform all other acts which might then or thereafter be required of them by law, and afterwards, and on, to wit, April 12, 1901, the said executors filed an inventory in said Court of all the estate of said deceased which had come to their possession, knowledge or control, and in said inventory the said executors set forth certain goods and chattels and certain parcels of real estate but did not set forth or include in said inventory the claim for damages set forth in the declaration filed herein and to recover which this suit was instituted, which said inventory was the only inventory ever filed by said executors in said court, and the defendants say that after the commencement of this suit and before the filing of said amendment filed herein on November 11, 1909, to wit, on the 25th day of February 1903, said Executors presented to said Probate Court their final account of the estate of said deceased and prayed that the same be approved and that they be discharged as such executors, and thereafter, to wit on the day last aforesaid, said Court entered an order finding that all the assets of said estate had been collected and all claims against said estate paid, and ordering that said estate be declared settled and said executors be discharged upon filing a voucher from the guardian of one of the legatees under the will of said deceased for the amount of his legacy, and afterwards to wit on May 12, 1903, said executors presented to said Court the receipt of said guardian for the amount of said legacy, and afterwards, to wit, on the day last afore-
25 said, said Court by an order entered of record on said day ordered that said estate be declared settled and that the said Ella A. Brand, E. L. Brand, Jr., and E. Belle Brand be and they were thereby discharged as such executors. And the defendants further say that said Probate Court of Cook County, Illinois, has not since its discharge of said executors reinstated said executors or granted letters testamentary or of administration to any person or persons whomsoever to administer the goods and estate of said deceased not already administered. And this the defendants are ready to verify. Wherefore they pray judgment if the plaintiffs

ought further to have or maintain their aforesaid action against them, etc.

Sixth Plea. And for a further plea in this behalf the defendants say that the plaintiffs ought not further to have or maintain their aforesaid action against them, because they say that after the commencement of this suit and before the filing of said amendment filed herein on November 11, 1909, that is to say, on the 12th day of May 1903, the said plaintiffs were by the Probate Court of Cook County Illinois, discharged as Executors, since which time they have ceased to act as such Executors, and the defendants further say that said Probate Court of Cook County, Illinois, has not since its discharge of said executors reinstated said Executors or granted letters testamentary or of administration to any person or persons whomsoever to administer the goods and estate of said deceased not already administered. And this the defendants are ready to verify. Wherefore they pray judgment if the plaintiffs ought further to have or maintain their aforesaid action against them, etc.

CLARENCE A. KNIGHT,
Attorney for Defendants.

26 STATE OF ILLINOIS,
County of Cook, ss:

W. G. Adams, being first duly sworn, deposes and says that he is the duly authorized agent of the defendants in this behalf.

Affiant further states that he has read the foregoing Fifth and Sixth Pleas and knows the contents thereof and is familiar with the facts therein set forth, and that the said pleas are true in substance and in fact.

W. G. ADAMS.

Subscribed and sworn to before me this 15th day of November A. D. 1909.

[SEAL.] ALICE NELSON LEE,
Notary Public.

And afterwards, to wit, on the 17th day of November, A. D. 1909 a certain Replications and Demurrers were filed in the office of the Clerk of said Court in words and figures following to-wit:

27 STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Case. Gen. No. 225,611. Term No. 275.

ELLA A. BRAND, E. L. BRAND, JR., and E. BELLE BRAND (now Atwell), Executors under the Last Will and Testament of Edwin L. Brand, Deceased,

vs.

UNION ELEVATED RAILROAD COMPANY et al.

Replications to First, Second, Third, and Fourth Pleas and Demurrers to the Fifth and Sixth Pleas. Filed November 16, 1909.

And the plaintiffs, as to the plea of said defendants by them firstly above pleaded on which they put themselves upon the country, do the like.

And the plaintiffs, as to the plea of said defendants secondly above pleaded, say that they, the plaintiffs, by reason of anything in that plea alleged ought not to be barred from having their aforesaid action, because they say that at the time of the filing of said amendments to declaration herein on November 11, 1909, the said plaintiffs were executors under the last will and testament of Edwin L. Brand, deceased, as in said Declaration alleged, and this the plaintiffs — may be inquired of by the country.

And the plaintiffs, as to the plea of the said defendants thirdly above pleaded, say that they, the plaintiffs, by reason of anything in that plea alleged ought not to be barred from having their aforesaid action, because they say that they, the plaintiffs, are now and were at the time of the commencement of this action executors under the last will and testament of said Edwin L. Brand, deceased, as in their said declaration alleged and this the plain-
28 tiffs pray may be inquired of by the country.

And the plaintiffs, as to the plea of said defendants fourthly above pleaded, say that they, the plaintiffs, by reason of anything in that plea alleged, ought not to be barred from having their aforesaid action because they say that at the time of the committing of the grievances complained of in said declaration the said Edwin L. Brand was the owner of the premises in said declaration described, as by the said Declaration it is alleged; and this the plaintiffs pray may be inquired of by the country, etc.

And the plaintiffs as to the plea of the defendants by them fifthly above pleaded, say that the same and the matters therein contained in manner and form as the same are above pleaded, are not sufficient in law to bar them, the plaintiffs, from having their aforesaid action, and that they are not bound by law to answer the same, and this they are ready to verify; Wherefore, for want of a sufficient plea in this behalf, the plaintiffs pray judgment, etc.

And the plaintiffs, as to the pleas of the defendants by them

sixthly above pleaded, say that the same and the matters therein contained, in manner and form as the same are above pleaded, are not sufficient in law to bar them, the plaintiffs, from having their aforesaid action, and that they are not bound by law to answer the same, and this they are ready to verify; Wherefore, for want of a sufficient plea in this behalf, the plaintiffs pray judgment, etc.

HARRY S. MECARTNEY,
Attorney for Plaintiffs.

29 And afterwards, to-wit, on the 29th day of November A. D. 1909 the following proceedings were had and entered of record in said Court, to-wit:

225,611. Case.

ELLA A. BRAND et al., Ex'rs, etc.,
vs.
THE UNION ELEVATED RAILROAD COMPANY et al.

This cause coming on to be heard upon the demurrers to the defendants' fifth and sixth pleas filed herein, after arguments of counsel and due deliberation by the court, said demurrers are sustained to which the defendants except and this cause being called for trial come the parties to this suit by their attorneys respectively and issues being joined, it is ordered that a jury come, whereupon come the jurors of a jury of good and lawful men, to-wit: August W. J. Schroeder, Charles K. Anderson, Adolph C. Brand, Aeneas D. Mackey, Alfred A. Dauding, John De Lamater, William J. Buick, Charles Strauch, Robert M. Arnold, Charles O. Johnson, Mark M. Shinners and Albert E. Hurd, who being duly elected, tried and sworn well and truly, to try the issues joined herein and a true verdict render according to the evidence and the hour for adjournment having arrived it is ordered that said jury be permitted to separate until tomorrow morning.

And afterwards, to-wit, on the 30th day of November A. D. 1909, the following proceedings were had and entered of record in said Court, to-wit:

225,611. Case.

ELLA A. BRAND et al., Ex'rs, etc.,
vs.
THE UNION ELEVATED RAILROAD COMPANY et al.

30 This day again come the parties to this suit by their attorneys respectively and the jury impaneled herein also come and the hour for adjournment having arrived, it is ordered that said jury be permitted to separate until tomorrow morning.

And afterwards, to-wit, on the 1st day of December A. D. 1909, a certain Verdict was filed in the office of the Clerk of said Court, in words and figures following, to wit:

We the jury find the defendant not guilty.

CHAS. O. JOHNSON, *Foreman.*

And on to wit, on the 1st day of December A. D. 1909 the following proceedings were had and entered of record in said Court, to-wit:

225,611. Case.

ELLA A. BRAND et al., Ex'rs, etc.,

vs.

THE UNION ELEVATED RAILROAD COMPANY et al.

This day again come the parties to this suit by their attorneys respectively and the jury impaneled herein also come and at the close of the plaintiffs' evidence the court instructs the jury to find the defendants not guilty, to which the plaintiffs except and the jury say:

We the jury find the defendants not guilty to which the plaintiffs except.

Whereupon the plaintiffs enter herein their motion for a new trial in said cause.

31 And afterwards, to wit, on the 11th day of December A. D. 1909 the following proceedings were had and entered of record in said Court, to wit;

225,611. CASE.

ELLA A. BRAND, E. L. BRAND, JR., and E. BELLE BRAND Executors and Trustees under the Last Will of Edwin L. Brand Deceased,

vs.

THE UNION ELEVATED RAILROAD COMPANY, THE LAKE STREET Elevated Railroad Company, the South Side Elevated Railroad Company, The Northwestern Elevated Railroad Company, The Metropolitan West Side Elevated Railway Company.

This cause coming on to be heard upon the plaintiffs' motion heretofore entered herein for a new trial in said cause after arguments of counsel and due deliberation by the Court, said motion is overruled and a new trial denied, to which the plaintiffs except.

Therefore it is considered by the court that the plaintiffs take nothing by their said suit and the defendants go hence without day and do have and recover of and from the plaintiffs their costs and charges in this behalf expended and to be paid in due course of administration.

Whereupon the plaintiffs having entered their exceptions herein, pray an appeal from the judgment of this court to the supreme court in and for the State of Illinois which is allowed upon filing

their appeal bond in the sum of two hundred and fifty dollars to be approved by the court within twenty days from this date and leave given the plaintiffs to file their bill of exceptions herein within twenty days from this date and thereupon the plaintiffs present their bill of exceptions this day.

32 And afterwards, to wit, on the 21st day of December A. D. 1909 a certain Bill of Exceptions was filed in the office of the Clerk of said Court, in words and figures following, to-wit:

In the Superior Court of Cook County, Ills.

No. 225,611. Case.

ELLA A. BRAND,
v.
UNION ELEVATED R. R. Co., et al.

Bill of Exceptions.

33 STATE OF ILLINOIS,
County of Cook:

In the Superior Court of Cook County.

BRAND
v.
UNION ELEVATED RAILROAD COMPANY.

Bill of Exceptions.

Be it remembered that heretofore, to wit, on November 30, 1909, being one of the days of the November term of said Court, said above entitled cause came on for trial before the Hon Marcus Kavanagh and a jury, upon the pleadings heretofore filed herein:

Appearances:

Mr. H. S. Mecartney for Plaintiff,
Mr. Clarence A. Knight and
Mr. Francis W. Walker for Defendants.

Opening Statements.

The COURT: Gentlemen will there be a view of the premises in this case?

Mr. MECARTNEY: Yes, we are going to move for one under the statute.

The COURT: Is there any objection?

Mr. WALKER: No; do we want to open first so as to get some idea of the case, and then go down?

Mr. MECARTNEY: I think that is the better way.

Mr. WALKER: We would get a better outline of our thought perhaps.

34 The COURT: Yes, we will open the case and then go down. You may proceed now and make the statement for the plaintiff.

Mr. MECARTNEY: May it please the court, and gentlemen of the jury.

It is usual that after a jury is sworn the plaintiff's counsel makes a statement somewhat in detail, and yet a general outline only, as I might say, of the case as he expects the evidence to show it; so that you may more readily apply the facts as they fall from the lips of the witnesses, and thus subserve economy in the whole presentation.

I shall now try to briefly outline the facts and issues from the standpoint of the plaintiff and as I expect the evidence to substantiate. The plaintiffs are E. Belle Brand (in the last year or two her name has been changed to Atwell) a daughter of the old time photographer Brand, and Edwin L. Brand, Jr., the son and the widow, Ella L. Brand, who sue as executors of the estate of Edwin L. Brand, deceased. They allege and claim that the premises known as No. 259 Wabash avenue, owned by Mr. Brand in his lifetime, and this cause of action surviving to them as executors of his estate; that that property has been damaged in its market value by the construction of the Elevated railroad structure in front of the premises for public railroad uses. The property in question is 25x171½ and faces East on Wabash avenue about half way between Jackson and Van Buren streets; the structure, as the evidence will show was commenced late in the fall of 1896 or early in the spring of the year 1897 and was finished in October, 1897.

35 Mr. WALKER: You are speaking now of the railroad structure?

Mr. MECARTNEY: The railroad structure yes; and the cause of action commenced some years later and we are now reaching a trial of it.

The railroad, usually called the "Loop Railroad" by virtue of the fact that it runs around four streets of the South side and constitutes what we all know as "The Loop", was constructed by the Union Elevated Railroad Company under an ordinance providing that it should be constructed for the benefit of the four other railroad companies which, since the time of its construction, have been using it for public uses in the way of their railroad trains.

The law as it will be given to you, as we understand it is, that under the Constitution of Illinois—and in fact which probably you all know from common experience and knowledge—private property shall not be taken or damaged for public use without just compensation, and we sue under that clause of the Constitution and upon the idea, and the basis, as we expect the law to be given to you, that notwithstanding the City Ordinance allowed the construction of the road that that is no bar to our recovery if damages have been in fact sustained. Damages in the eye of the law is damage to the market value of the property, usually arising from some interference with

the private enjoyment or use of the property. We claim, then, that under the law, another fact which we presume will not be disputed, that every premises abutting upon a public street has what is called abutters' rights in that street; they have special rights in the street apart from the rights the public have to go and pass over them. Amongst those rights is the right of free and uninterrupted access and of the ordinary enjoyment of light and air from the
36 street, and also that those street rights are protected from obstructions in the street which are not ordinary street improvements, like, for instance, a pavement on the level, or possibly a street car track upon the level of the ground. Any radical change or obstruction above that is a violation, as we will claim of the abutter's rights.

Now, again, the theory is that this structure was built for public uses by the companies organized under the Railroad act of Illinois, they are simply a railroad, differing from a common railroad running through the country only in the fact that usually, at least, now and heretofore there have been passengers taken up over the entire route, and also that the roads are usually shorter than ordinary railroads; but it is a railroad in a street and upon a structure which is violative of the ordinary rights of the abutter in the street, unless in some way they can show some particular, special, immediate, well defined benefit to that property itself, arising from some particular method of construction, possibly, for instance, as if there had been a station immediately in front of it or near it and the structure in some way connected with the property so as to give a direct, physical benefit of some kind.

Now, the next point in the outline is this: we expect to show by the evidence that this is a four-story building, constructed over twenty years ago or more on this lot, and that before the road and immediately before the road was constructed in front of it the property was bringing in and had a rent roll of about $7,500.00. They had to start to work immediately after that to improve the property and remodel it, and Mr. Brand put about $10,000 into the building in 1897 and it was rented afterwards to various tenants, before
37 it was rented to one tenant, the whole building, for $7,500. The first tenants after the road started operation in 1897 was the Estey & Camp Musical Piano Company, who paid for the first floor, as I remember it, $350. a month. About a year later it was re-rented to Chase Bros. at $300 a month and the total net income from the building or rent roll of the building was slightly in advance of what it was before the road went there even in dull times, and for several years thereafter. We don't apprehend that there will be a great deal of evidence introduced in the case, and of course we cannot tell at this juncture; I am only able to give you my ideas. The theory of the law is that so far as public works are concerned, if a damage is created to the property the property owner recovers in one lump sum for the damage, past, present and future. Just in one lump sum; in that there is a distinction between what may be called a public structure or a private structure. For instance, if some neighbor maintained a structure in the alley or in the street

in front of it, we would have a cause of action against him, but the idea of the law would be that that could be abated and we would only have a right to recover the actual damage suffered up to the time we commenced suit. We could sue again for whatever damages suffered beyond that; but in the eye of the law a public improvement, like a railroad, a canal or a viaduct, or something of that sort, is deemed as permanent, to forever remain there. It is so seldom that there is a change that the idea of the law is to treat it as practically permanent; and that being so, the fact that it is to forever remain there has an instantaneous effect, if it has any effect, upon the property at the time it is built. There are two elements, therefore, or two features that surround this particular part of the controversy or this ele-
38 ment in the case, namely; not only is there a structure there, but it is a structure that is to be used for railroad purposes. The same suggestion and question would refer to the construction and operation of the road. Now, we do not seek to recover and we cannot recover strictly for the construction and operation of the road. We cannot recover for the operation as it is operated from year to year; we do not seek to. But the fact that the road is constructed in such a lasting manner, plus the fact that it is to be forever operated, you see, gives the effect, if it gives any effect at that time; and therefore, the theory of the law is that a man recovers for that change in the use of his property one lump sum when it has completed its damage, or penalty, or whatever it may be. So that the case in this essential becomes somewhat simple; no matter what the evidence may be, the issue is simple; and therefore, as we understand you will have to exclude all evidence, or all allowance or offsets for any subsequent increase or decrease in the value of the property, as the case may be, because that is a matter that is bound up with so many other elements which are conjectural like the crowding the city, increase of population and various other facilities and all that sort of thing; it would be impossible to separate from that any evidence of value or measure the effect upon the property except that if there be any evidence given as to conditions immediately before and conditions immediately after, it is proper for what they are worth, if you consider what the effect was; but the effect is at the time the road was completed and the trains of all these companies started over them. I try to make that clear because it is very important.

39 Now we expect the evidence—and your view of the premises will be, as we think, the most important thing in the case—the actual, physical structure and its mode of operation and the noise and racket and pandemomium, as we would call it, that the road makes in front of the premises; the more or less obstruction to light and other inconvenience—some inconvenience of access and egress for wagons, and all that, all affecting the use of the property, and as we think, that will appear to you to be self-evident and the damage prima facie established; and then it will be for the opposition, if they can in any way show to you that there are any particular special benefits to this property apart from property generally and apart from the general travel convenience which this

property had a right to after the road was established; and any possible increase in value that came after the road was established, of course, our contention is, will not be considered.

Now there will be, possibly, some difference of opinion in the statement of the issues between myself and Mr. Walker who is to follow me, and we cannot at this time follow them. It will be for you to keep your minds in abeyance until after you have heard the instructions of the court, if there be such difference, as to which of the counsel is right.

I might say that right south of these premises, around the Van Buren street curve there is a special nuisance, not far from these premises, in the turns which the trains make in passing from one track to another track; there is a constant, terrible screeching, a heavy noise.

We also think the evidence will show that the character of Wabash avenue largely changed from what it was before, and especially with the prospects attached to that street. The evidence, we
40 think will show that prior to the time the road went there Wabash avenue was fast taking the trade of State street, and especially went down that way, there had been retail stores established; large deals on the future of the street. It was in fact, at this place, I believe the evidence will show, fully as broad as State street; and at this time owing to the fact that State street opposite these premises was not so attractive, of course, as the places further north, this particular block and the blocks in the immediate neighborhood compared favorably then with State street, and were definitely and decidedly better than Michigan avenue, and I think a year or two after the road went through, several years at the outside, Michigan avenue had advanced largely and this property in this block remained stationery, or retrograded for several years.

We do not claim, and I want to be as fair as I can at the outset, that this structure is as great a damage to this property as it would be if it were a narrow street. The street there is 100 feet wide, and yet we shall claim that our rights were over the whole street and there is a definite damage in the street uses being destroyed; not as great a damage as it would be if the street were only fifty or sixty feet wide and the structure put up against the sidewalks and buildings; and all that; but still, a definite damage. It will be for you to measure it from the evidence, if you sustain our view that it is a definite damage.

I think that is all. Thank you.

41 Mr. WALKER: May it please the court, and you, gentlemen of the jury:

Instead of reserving the opening until after the close of the plaintiff's case, as is frequently done, I will outline now the nature and character of our defense to this proposition, in order that you may have the suggestions of both counsel before you as you proceed after the close of the arguments, which I understand the ruling to be, to view the property. Before there will, therefore, be any testimony taken from witnesses on the stand, after the close of this opening argument, you gentlemen in the company of the bailiff

and, I suppose, counsel, without commenting, because we can have no conversation with you on the facts; merely point out the place—we will go and view the premises in question. Therefore, that you may have both sides of the litigation in front of you, I will outline the defense."

Mr. Mecartney, in order to explain the issues from his standpoint, has told you his theory of the matter and the proposition of law for which he contends. We are diametrically opposed to that contention of law, claiming that the entire authorities of the supreme court and general branches refute his claim—statement of it—and you will ultimately on that proposition be compelled, as you would in any event, to take instructions from the court.

The constitution of this State provides, as Mr. Mecartney says, that private property shall not be taken for public use or damaged for public use without just compensation. The right of eminent domain and the right with which this elevated road operates
42 in this State is a public right and if there are damages within the meaning and contemplation of the law, then this plaintiff would be entitled to recover for these damages, because the property would then be damaged for public use. But the law never understands nor never says that there is damages, whether a man is damaged or not is a question of fact in reality, for a jury to determine; so that it is distinguished from a condemnation proceeding, where you take it all and must pay for it at the value. No one can recover damages unless there be actual damages under that clause of the constitution, and there is no presumption of law or presumption of fact that there is damage. And then, to go further, the term "damages" means damages that were recoverable for at common law; it means damage at common law, Judge, and I may, in making this law argument in answer to his contention, address myself more specifically to the court; that is, those things, if your Honor please which are damnum absque injuria, or damnum absque injuria under the constitution of Illinois; that is to say, if I may make it plainer to you, the City of Chicago could condemn a piece of property for a police station next door to your private residence; you cannot recover, because it is within the power of the city and it is damnum absque injuria; it may damage less than the market value. Some denomination may build a church next door to the finest residence on Michigan avenue, they have the right to do it; it is damnum absque injuria. It may damage your property, but there can be no recovery, no more than there can be where a lot line was not made and a man put a flat building out to the very end of the lot line in front of a magnificent residence, and there can not be any recovery. I am only stating that so that this jury may
43 understand us. The City of Chicago can build a pest house, a smallpox hospital next door to your house, and it is damnum absque injuria; that is, damage without injury, such a thing as the individual cannot recover for. So the word "damage" does not necessarily mean any loss that a man may suffer in property, because he gets his right to own property, to have it, by reason of the social order and the protection of the law and his individual right of

property which would not exist if the law of the strongest, that "might made right" was to be the law of utility; only the strongest would possess; but in civilized countries such as ours the law protects property rights and the property right of the individual must ultimately be subserved to the right of the public, which is a superior right, even in some instances at his loss, as I have explained. Now do not understand me to make an admission that there is damage here; I am not and have not made any such admission; I am simply trying to get before your mind that there might still be damage and no recovery, because there is such a thing recognized by law. This is no such case, however. On this proposition, as I say, you will have to take the instructions of the court.

In eighteen hundred, gentlemen, and ninety seven, in October, the Elevated Railroad on the Loop Road was put in operation on Wabash avenue; it runs on Van Buren street from Fifth avenue East to Wabash, North on Wabash to Lake, West on Lake to Fifth avenue and South on Fifth avenue to an Buren street, where it branches off and where the loop itself ends. Mr. Brand, the father of the persons suing as executors in this case—father and husband—owned this property and lived for three years and more after the
44 road was constructed and operated, without bringing suit or claiming damages, that will be shown in the case. After his death, the executors of this estate never scheduled any liability or claim in the Probate court as an asset of this estate, as we will establish, or claimed it or inventoried it, as a right of property, and they never brought a suit until the last day of the last hour——

Mr. KNIGHT: Twelve hours before.

Mr. WALKER: How many?

Mr. KNIGHT: Twelve hours.

Mr. WALKER: Was it that long? They went almost to the last hour of the last day of the Statute of Limitations which is five years after the road started its operation. Mr. Brand brought none in his life-time and had three years to bring it in and he was a cute man. But the last hour of the last day almost, the executors never having scheduled it as a claim, brings the suit for damages and under the Constitution, and it will be your province to pass on that issue under the law, not as I tell you, nor as Mr. Mecartney but as Judge Kavanagh will give it to you. Bearing that in mind, and I may tell you that the Statute of Limitations is five years, what becomes of the theory it was the instantaneous condition over the road as put in operation then and there that you discover Brand's present and future damages when you have five years to bring your suit in and you may ascertain the fact any time between the five years when it is known as a fact by the operation of the road itself——

45 Mr. MECARTNEY: I object to an argument of the merits.

Mr. WALKER: Perhaps it is Judge, but his statement of his theory of the law was argumentative.

The COURT: All right, go ahead.

To which ruling of the Court, counsel for Plaintiffs then and there duly excepted.

The COURT: What further do you intend to prove?

Mr. WALKER: We expect to be able to show you, as we contend—I shall place it as a contention, as he did, that it is the condition and value of the property today and all the time since the railroad—its income now and the conditions on that street up to this very hour and what its future will be that is the basis of the right to future recovery and whether there be damages or not and not the instantaneous thing, at the minute.

We will prove to you that the property was leased for some length of time by the Pecks. I don't know the number of years, just now of their lease, but it expired about the time the Elevated Road went into operation at $7,500.00 a year. I think it will be established that the property in question in this case was one of the early buildings built after the Chicago Fire in 1871. You will see, when you go there, and from the evidence as it will be shown, that that was the old kind of construction, a substantially worn out building, as far as its competition with the modern buildings of today or five years ago, without an elevator at that time, in competition with the growing buildings, and the falling of rental was occasioned, as you will ascertain by the construction and nature of the improvement on the ground itself, as we will establish by the evidence in this case.

46 You will find out later, as we go along, that the rental has been continually increased; that, of course, during the improvement period when people were demanding an elevator, I think the Pecks were there. We will establish the Pecks moved out because there was no elevator in the building and no way to get from the bottom story, the office part, upstairs to their place of storage, etc., and to their store-room except walk. They ultimately put in a building not constructed for the purposes of an elevator, an elevator, but it was not modern in any sense. It was one of the old time buildings. The value of the property is in the land and in the land alone, except as a man would not part with something that would pay income unless someone allowed something of value for it. I think the building might be relatively worth on that proposition $25,000.00 or $30,000.00.

I think it will be established here, gentlemen of the jury in this case that that property was worth about $3,000.00 a foot—$3,000.00 a front foot on Wabash avenue in 1897 at the time the road came there. I think that it will be established that today, at this minute, it is worth between $7,500.00 a front foot and $9,000.00 a front foot on Wabash avenue at that corner, and that therefore there is no loss and no damage, the contention being that damage means loss of money, loss of value.

We will show you the development of properties on Wabash avenue. The Cable building on the corner of Adams street and its rental value a block north of this at the corner of Adams. The corner of Adams and Wabash avenue where the Steger building is now going up, rented on a basis, the highest in Chicago
47 of $30,000.00 a front foot. The northwest corner of Jackson and Wabash avenue and the new improvements and

new buildings and that the new improvements and new buildings, bringing office centers to that place, only arose after that Elevated railroad came there and that Michigan avenue, for instance, South of Madison street was, had no single office building on the street and that the building of office buildings on Michigan avenue, one block east of this, we will show you raised the value of the entire territory, including Wabash avenue and that business blocks, just such as surround the court-house went over to Michigan avenue when the Elevated railroad became the center or conveyor of the street and Wabash avenue today is developing in the same sort of good buildings that the Cable building and Stewart building, eighteen stories high——

Mr. MECARTNEY: Mr. Walker, excuse me. I desire to object to stating these items of other buildings and dwelling upon them at this time. The general course of the structure of the street and its business is proper.

The COURT: I think he is illustrating simply what he intends to prove.

Mr. MECARTNEY: It gets before the Jury.

The COURT: Don't go too far.

Mr. WALKER: I am not trying to string it. I am going to be as short as possible but I want to get the theory in the mind of get the facts in mind that we intend to establish by the evidence in this case and I will state it generally that the growth and development of office buildings, modern new office buildings
48 on Michigan avenue like the Railroad exchange and like the old corner where the old Virginia hotel stood and the Harvester building and the new fine office buildings on Wabash avenue, is substantially as we will establish, and directly due to the transportation we furnish on the highways immediately joining and that the variation from $3,000.00 a front foot for this up to $8,000.00 today is due to the fact that the Metropolitan Elevated, the Alley Elevated, the Northwest Elevated Railroad and the Oak Park travel around the Loop and make, as we will establish the most remarkable financial and real estate center in the world—in the world!

We will prove to you, gentlemen, as a rule, that if noise is admissible at all as an element of damage, which we contend in any event there being no easement of quiet in a public highway,—you can't make a noise distinct and different that creates a nuisance at a given point, even if you have the public right to operate a railroad, surface or elevated in a street or an omnibus or a big truck, you can make as much noise as is necessary for the proper operation of the vehicle, but you can't go beyond that and create a nuisance, beyond what is essential in the conveyance you are using, so that there is not any direct easement in noise. A man has a right to light and air in the street. This elevated railroad structure is more than 30 feet. I think it is 19 feet to the curb. I haven't got the figures absolutely in mind and pretty near 25 or 30 feet from the curb to the structure and there isn't any columns that supports the structure in front of Mr. Brand's property, so substantially there is

from 30 to 50 feet clear space without any railroad in front of his property, so we will show there is no inference detrimental in money matters, to light and air and ingress and egress in any
49 way to the Brand property.

Counsel said something about a public structure being different from a private structure. I wish to comment on that in passing so that you will have that in your mind, that the private owner of a piece of property has different and other rights from the public who walk on the street or use the street for conveyance. I agree with that to some extent. He has the right to light and air, we will say and ingress and egress, perhaps. That, of course, the man who walks along the highway has no right, but he—there is no difference at all between an Elevated railroad, as a matter of law in the street and a surface line or auto car or wagon or walking man. The law of this State—and the Court will cite that authority—I only state it in answer to what he said on that, that an Elevated railroad in a street is not a servitude in the street but stands exactly and identically in reference to the street as a street car on the surface. Am I not right, Mr. Knight?

Mr. KNIGHT: Yes sir.

Mr. WALKER: So that you must take that, and I state it now so you will bear it in mind and say there was nothing I did not answer or bring to your attention on a claimed proposition of law that Mr. Mecartney made. That will be passed upon by the Court and the Court will have to tell you about what the law is. In the end, as we said in the beginning, you must take the law from Judge Kavanagh.

Now, gentlemen, we expect to show you that the transit upon Wabash avenue produced by this Elevated railroad substantially made the values which that street has reached has come within the Loop districts. That the improvements to the surface
50 lines beneath, the trucks, the modern equipment and the modern electric appliances was forced and compelled by the better competition that the elevated road gives along the same highway. That where the multitude of people landed—myriads that used to land on State street, coming down on the old State street car line and the surface lines, those people now are carried, instead of on State street, thousands of them, thousands on the Metropolitan, about 149,000 or 150,000 a day. I am not quite so familiar with the Northwestern and Alley L but there is carried down to that place and on Wabash avenue every day 400,000 or 500,000—more than 500,000 people land on Wabash avenue that never was landed on that street before that Elevated railroad came and that it is population reaching a given point that makes value on every street and that is what made the value on Madison and State, the multitude of people that reaches that point.

We expect to establish when you take transportation from a highway, you substantially ruin the property. That such property as that on Madison street, principally East of Halsted was entirely changed in its character and value when the street car lines were taken off Madison street and when they came across and were run

through the Tunnel afterwards and run over on the West side, out four or five blocks out, lowering them and damaging them to a most remarkable extent by taking the transportation off the highway.

Mr. Mecartney put the idea before you, but I am going to answer that and I am not going to take much time about it, just to get my thought of the law in your mind, that the effect is right then and there, as soon as trains are up there operating. Now, any-
51 thing right in the future is purely problematical and speculative. It doesn't follow a condition on Monday will be the condition on Tuesday or the condition on Wednesday will be the condition on Thursday and yet he takes before you a period of years, says there was vacancy in the building for a period of time after the Pecks moved out.

Mr. KNIGHT: Prior to 1897.

Mr. WALKER: 1893 and 1897 when the Pecks moved out and we will show you it was because there wasn't any elevator in the building and wasn't a fit building for their business, when their lease terminated. He expects to show you some future vacancies after the road was in operation and he calls that instantaneous. How are you going to prove the future except by evidence that shows and bears relation to the future.

Now, we expect to show you a continual increase in value in Wabash avenue, show the value has tribled up to this hour and the way to find out what has been the effect of that road upon that property is to produce and prove the conditions on the street at the time the road came, its value at the time the road came, its rental value at the time the road came, what was getting for it, the improvements on the street when the road came and then show what the progress has been in values and rent and in improvement after the road got there and that is the way to tell something about the future.

I must put one question in your mind more. Mr. Mecartney says we are not to consider the continuing operation of this road as a reason, because we get all the—we discover all the damages for the future, but we are not to consider the continuing opera-
52 tion because that must be limited to recovery to the very date when the road began. Gentlemen, we will expect the court to instruct you that it is not isolated conditions that make values; that whatever has increased the market value of the Brand property, that that is a special benefit to that property and not a damage, no matter how any other properties were benefited. In addition to that, that it is not the similarity and single effect of whether this noise is beneficial or whether the structure is picturesque or beautiful or what is the total effect of an isolated point or thing, but what is the total effect of this road altogether on this property. You can't say, we will try or establish as a proposition of law there is noise, that damaged it 10 per cent and then there is a loss of light and that damaged it five per cent. They claim there is loss of ingress and egress (we will show there is not) and that is five per cent; that makes twenty percent. That is not the method

or theory because it is not whether noise damages it or whether the light is damaged—although that is proper evidence to introduce—or ingress and egress that has been disturbed, but whether taking the road altogether, recognizing that it makes noise, that there is a structure there that may or may not be an interference—we are going to show that it is not, in fact, but taking into consideration there is interruption of light and air and taking into consideration there is a station at Madison street and there is a station at Randolph and Wabash avenue and a station at Van Buren and Fifth
53 avenue and Clark; that there are 500,000 of people or more put right into Wabash avenue every day of the year and every business day of the year that never were there before, that that is a means of transit, continuing to the door in front of this building, giving it transit or anything else what is the total effect of the road, transit and all, on its value, and then if this property is worth more after the road came than it was before, and if it rented for more than it did before the road came, there is not any damage, no matter how much noise it makes. That will be our contention in law, not how much light it takes nor how much air it takes because the total effect has been beneficial. And the man is richer—the question is, is he richer than he would have been or is he just as rich as if the road had not been built. If he is richer, he is not damaged. If he is not damaged, he has not lost anything. Damage means loss, injury, money out of your pocket, poorer than you were before. I think that is all, Judge.

Mr. MECARTNEY: If the Court please, there is one single fact that I omitted which I would like to ask the Court's indulgence in giving. Mr. Walker may have a chance to answer.

Mr. WALKER: That is all right. I have no objection at all.

Mr. MECARTNEY: I forgot to state to the jury we think the evidence will show at the time the road was completed general business conditions were improved and real estate generally began to pick up then all over the general markets.

Mr. KNIGHT: There was a panic in 1893.

54 Mr. MECARTNEY: I am talking of 1897. I only want to comment upon that to the jury, that we expect to show that naturally the property was due to increase and it did not in fact increase for several years thereafter.

Mr. WALKER: We will establish, gentlemen, that there was a panic, if it becomes essential, in 1893; that while values, to some extent, were maintained on Wabash avenue because owners would not part with it, that two years or more before the road was put in operation, when the panic was at its height, it became known as a matter of fact that the celebrated structure—and there had been years and years of negotiations while Mr. Knight and the men interested in the various Elevated — were trying to get a downtown business terminal for the various roads; it was known two years in advance and before the road was constructed at all, it was absolutely certain that it was to be constructed on Wabash avenue. We will establish that the good effect was felt right in the heat of the panic in that street and those streets by the reason of the fact that they knew the

Loop was coming there and going to bring those 400,000 or 500,000 that never came on Wabash before.

Whereupon the jury were sent to view the premises in question, and court adjourned to two o'clock P. M.

55 And thereupon the plaintiffs to maintain the issues on their part, introduced the following evidence, to-wit:

CHRISTIAN FLORUP, called as a witness on behalf of Plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. MECARTNEY:

Q. Mr. Florup, speak loudly and distinctly so the extreme juror can hear you. Your name?
A. Christian Florup.
Q. Your business
A. Real estate.
Q. With what estate, if any, are you connected in business?
A. The estate of Edwin L. Brand.
Q. To identify him, let me ask what was his business in his life-time?
A. Photographer.
Q. With his place of business on——
A. Wabash avenue.
Q. On which side of the street?
A. On the East side of the street.
Q. How long have you been connected or were you connected with Mr. Brand in real estate matters during his life-time?
A. About twelve or thirteen years, thirteen or fourteen years, I guess.
Q. When did he die, about?
A. 1900.
Q. And for 12 or fourteen years prior to that, you were associated with him?
A. Yes.
Q. Do you know the property in question in this suit?
A. Yes sir.
Q. How long have you known it?
A. Since Mr. Brand bought it.
56 Q. When was that?
A. If I recollect, it was in 1888 or 1889,—1888 or 1889.

Mr. MECARTNEY: I offer the deed.

Mr. WALKER: I didn't get your name.
A. Christian Florup.
Mr. WALKER: F-l*pe*-r-u-p?
A. Yes.

Mr. WALKER: What are you offering?
Mr. MECARTNEY: I desire to offer a warranty deed from Calvin

F. Rice and wife to Edwin L. Brand of the premises in question dated November 13, 1889, which I present to counsel for inspection (handing same to counsel). I offer this original deed from Rice and wife to Edwin L. Brand, dated November 13, 1889, consideration $80,000.00. I will read it into the record It is the original deed and we would like to retain it.

Mr. WALKER: What is the consideration?

Mr. MECARTNEY: $80,000 and the premises are subject to an encumbrance of $30,000 which the grantee assumes.

Mr. WALKER: Just repeat the date, will you, please?

Mr. MECARTNEY: November 13, 1889, acknowledged December 3, 1889, recorded in the Recorder's office of Cook county, Illinois, December 3, 1889 in Book 2838 of records, page 27. I would prefer to read this into the record, but to save time I will have the stenographer copy it, or I will read it. Whereupon said document was read into the record in words and figures following, towit:

"This indenture witnesseth that the grantors Calvin F. Rice and Harriet A. Rice, of the City of Chicago, County of Cook and State of Illinois, for and in consideration of the sum of Eighty thousand dollars ($80,000.00) in hand paid, convey and warrant to Edwin L. Brand of the City of Chicago, County of Cook and State of Illinois the following described real estate, to-wit: The North
57 Twenty-five (25) feet of Lot five (5) in Block seven (7) in Fractional section Fifteen (15) Addition to Chicago, subject, however, to a certain trust deed dated May 3, 1889, recorded May 4, 1889 in the Recorder's office of said Cook county as document 1,095,999 by said grantors to David Quigg, to secure $30,000.00 payable in five years from its date, which said indebtedness with the interest thereon accrued since November 2nd, 1889 said grantee hereby assumes and agrees to pay.

Grantors do not warrant as to so much of said premises as lies within the alley in the rear situated in the City of Chicago, County of Cook and State of Illinois, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption laws of this state. This conveyance is subject also to all taxes and assessments levied after 1888 and is also subject to party wall agreements relating to walls on the North and South boundaries of said premises.

Dated this 13th day of November A. D. 1889.

CALVIN F. RICE.
HARRIET A. RICE.

STATE OF ILLINOIS,
County of Cook, ss:

I, Lucy M. Gaylord, a Notary Public in and for said County, in the State aforesaid, do hereby certify that Calvin F. Rice, and Harriet A. Rice who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for

the uses and purposes therein set forth, including the release and waiver of the rights of Homestead.

58 Given under my hand and Notarial seal this 3rd day of December, A. D. 1889.

[Notarial Seal of Lucy M. Gaylord.]

LUCY M. GAYLORD,
Notary Public.

Mr. WALKER: Mr. Mecartney, I suppose the building was on the ground at the time that is there now and that deed includes the building as well as the ground?

Mr. MECARTNEY: I assume so.

Mr. WALKER: That is right, is it?

The WITNESS: Yes.

Mr. MECARTNEY: You can mark it for identification, but as it was read into the record, it may be unnecessary to mark it but you may mark it Plaintiff's Exhibit 1.

(Deed so marked.)

Q. Did you have anything to do with this building, about and for it in Mr. Brand's life-time.

A. I collected the rents and looked over the property.

Q. Did you also negotiate leases?

A. Yes.

Q. How were the premises improved in the years 1895, 1896, and 1897?

A. Five story building, the same as it is today.

Mr. WALKER: The same building?

A. The same building.

Q. Was, at any time, any change or alteration made during those years on that building?

A. At various times, yes.

Q. I mean during the years 1895, 1896, 1897 or 1898?

A. Yes, in 1898 the building was remodelled.

Q. In 1898?

A. Between 1897 and 1898, during the years that time.

Mr. MECARTNEY: I would like to offer a certified copy of Letters testamentary with will annexed in the estate of Edwin L.

59 Brand, signed by James Reddick, Clerk of the Probate Court of Cook county, as Plaintiff's Exhibit 2.

Mr. WALKER: That is the will, certified copy of the will?

Mr. MECARTNEY: The will and letters.

Mr. WALKER: Are the Letters and Will both in that one.

Mr. MECARTNEY: Yes, letters testamentary with will annexed.

Which said document was marked Plaintiff's Exhibit 2 and is in words and figures following, to-wit:

"PLAINTIFF'S EXHIBIT 2."

"I, Edwin L. Brand, of the City of Chicago, county of Cook and State of Illinois, being of sound mind and memory, considering the uncertainty of human life and being desirous of disposing of my estate in such way as I trust will be for the best interests of those near and dear to me, do make, publish and declare this my last will *will* and testament, hereby revoking all former wills by me made.

First. Out of the personal estate which I may leave at the time of my death I direct that my executors hereinafter named pay the expenses of my last sickness, and funeral expenses.

Second. I direct that my Executors shall also pay out of such personal property all debts which may be justly and legally owing at my death.

Third. I give, devisse and bequeath to my beloved wife, Ella A. Brand, all my household furniture, books and other personal property, pertaining to and used or intended to be used in and about my residence at No. 1918 Michigan avenue, in the City of Chicago.

Fourth. I further give and bequeath to my wife, Ella A. Brand, the free use of my residence, known as No. 1918 Michigan avenue,
Chicago, for a residence for herself and my children during
60 the term of her natural life, or so long as she may wish to use
it as such residence; subject to this right said homestead shall be treated as part of my estate.

Fifth. In respect to the memory of my dear sister, Mrs. Lucy May, I give and bequeath to her grandchildren, the children of my nephew, E. R. May, of Minneapolis, the sum of Two hundred dollars ($200.00) to be divided among them, or such of them as are living, at the time of my death, share and share alike.

Sixth. In respect to the memory of my dear sister, Mrs. Anna Brand Spencer, I give and bequeath to her adopted son, Haley Spencer, now of Chicago, the sum of two hundred dollars ($200.00) if he be living at the time of my decease.

Seventh. I give and bequeath one hundred dollars ($100.00) as a little remembrance to Edwin Brand Beacham, of Toronto, Canada, if he be living at my decease.

Eighth. I give and bequeath to Mrs. Ella Young Williams, daughter of my dear sister, Sophronia M. Clark, the sum of two hundred dollars ($200.00).

Ninth. I give, devise and bequeath to my dear brother, James H. Brand, of Utica, New York, the sum of three hundred dollars ($300.00) if he be living at the time of my death.

Tenth. I give and bequeath to my dear brother, George B. Brand, of Chicago, if he be living at the time of my death, a like sum of Three hundred dollars ($300.00). I also give him all the notes and obligations belonging to me given for moneys advanced to the firm of Higgins & Brand, of which he was formerly a partner.

Eleventh. I give and bequeath to my dear brother, Alfred E.

Brand, now of Lansing, Michigan, the sum of three hundred dollars ($300.00) if he be living at the time of my death.

61 Twelfth. I give and bequeath to my niece, Mrs. O. D. Bassett now of Rome, New York, the sum of three hundred dollars ($300.00) if she be living at the time of my death; if not, then the same amount to her two daughters, Pearl and Robey Bassett, to be equally divided between them.

Thirteenth. I direct that my Executors and Trustees hereinafter named pay annually, until the division of my estate, such sum as may be necessary to keep in good condition our family burial lot in Forest Hill Cemetery in Utica, New York, and also the old family burying grounds in the Town of Edmeston, New York, where my parents and sisters are buried.

Fourteenth. I give and bequeath to my son, Edwin L. Brand, Jr. all the diamonds, jewelry and personal effects of my deceased wife Helen Mott Brand, also all my horses, carriages, harness, and all furnishings and equipments belonging thereto; also the sum of five thousand dollars ($5,000.00) in cash; also all my interest in the photographic studio at 210 and 212 Wabash avenue.

Fifteenth. I give and bequeath to my daughter, Ella Belle Brand, the sum of Five thousand dollars ($5,000.00), to be paid to her upon attaining the age of twenty-five (25) years; but in case she shall marry before reaching said age then I direct that said sum be paid to her upon her wedding day.

Sixteenth. Subject to the foregoing I give, devise and bequeath my entire estate, personal, real and mixed, in the condition the same may be at the time of my death, to my wife, Ella A. Brand, and my son Edwin L. Brand, Jr., and my daughter Ella Belle Brand, and to the survivors or survivor of them, or in case of resignation or refusal to act on the part of any thereof, then to such as shall

62 act in said capacity, and to their successors in said trust, without bond other than their own, upon trust, to manage and control the same; to collect, receive and receipt for the income, rents and profits thereof; also all insurance in case of loss by fire; also any moneys or property which may be due at my decease, or become due to my estate after my death; and I authorize and empower them to give receipts and discharges therefor, and to release any mortgage, trust deed or other lien securing the same.

Said trustees, or the survivors or survivor, or successors or successor thereof or such as shall, pursuant hereto, be acting in that capacity, shall have full power and authority to sell, convey, partition, lease, assign, transfer, invest and reinvest, from time to time, all or any part of the property which shall at any time be in their hand as trustees under this article of my will, and to change investments, from time to time, in their discretion, and no purchaser of any part thereof from them need see to the application of the purchase price. They may also pledge or mortgage any part of said trust estate for the maintenance of said trust property, or for the payment of taxes, assessments or other charges thereon, or to raise money for any of the purposes of this trust, but not for erecting buildings, funds for that purpose, if necessary in their judgment,

to be raised by accumulating income, as hereinafter provided. But no mortgages or pledges of any of said property, loaning money thereon, need see to the application thereof.

In case at any time during my said wife's life, she shall resign said trust or by reason of failing health or for any other reason shall be unable to act as such trustee, then any court of competent jurisdiction may appoint her successor in a proceeding for that
63 purpose, and such successor, after having duly qualified as directed by said Court, shall have all the authority and powers hereby conferred on my said wife, as such trustee, with the same effect as if herein named in that capacity in her stead.

No successor shall be appointed for either of my other trustees, but in case for any reason they, or either of them, shall die or resign or be unable or unwilling to act as such, the remainder shall have and exercise the same authority and powers as if such trustee or trustees had been omitted in the first instance.

Seventeenth. Out of the income of my estate my Trustee shall pay all taxes, insurance, repairs, necessary improvements and other expenses arising in and about the care and management of my estate, and may, in their discretion, set apart from time to time such portion of said income as they may think best and accumulate the same, in their discretion for the purpose of improving said real estate as they may think best, provided that no such improvements shall be made except to the extent of the money then in hand for that purpose. One-third of the remainder of said net income of said trust estate remaining after the payment of all expenses shall be paid to my wife, Ella A. Brand, one-third thereof to my son, Edwin L. Brand, Jr., and one-third thereof to my daughter, Ella Belle Brand during the continuance of the trust hereby created, in equal quarterly payments.

Eighteenth. The trust created under the provisions of this will shall terminate upon the decease of my wife, Ella A. Brand, and thereupon one-half of said trust estate shall go to and belong to my said son Edwin L. Brand, Jr., and the remaining one-half thereof shall go to and belong to my said daughter, Ella Belle Brand. In case of the death of either my son or daughter before the
64 termination of said trust leaving no issue surviving, the survivor shall, upon the decease of my wife, take the whole of said trust estate; but in case such deceased shall leave issue which shall survive at said period of distribution, such issue shall then take the share which would have belonged to the deceased parent, if living, per stirpes.

In case both of my said children shall die before the decease of my said wife, then at the death of the last survivor thereof, said trust shall cease, and thereupon one-third part of the remaining trust property shall go to and belong to my said wife, as her own property, and the balance shall go to the surviving issue of my deceased children, if any, the issue of each to take one-half thereof, as if inheriting the same by descent from the deceased parent; the remainder if either shall have left no issue, to be distributed in equal shares among my surviving brothers and sisters, the descend-

ants of any deceased brother or sister taking the share the parent would have received if living, per stirpes.

Nineteenth. I nominate and appoint my wife, Ella A. Brand, my son, Edwin L. Brand, Jr., and my daughter Ella Belle Brand, Executors of this my last will and testament, and direct that no bond shall be required of them as such.

In witness whereof I have hereunto set my hand and seal this tenth day of July, A. D., 1899.

EDWIN L. BRAND. [SEAL.]

65 The foregoing Instrument was, on the day of the date thereof, signed and sealed by the said Edwin L. Brand and declared by him to be his last Will and Testament in the presence of us, who, at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

NATHAN G. MOORE,
Oak Park, Ills.
GEO. SIMPSON EDDY,
710 *Adams Street, Chicago, Ills.*

Will proved and admitted to record in open Court this 26th day of January, A. D. 1901.

CHARLES S. CUTTING,
Probate Judge.

STATE OF ILLINOIS,
County of Cook, ss:

In the Probate Court of Cook County proved and admitted to record in open court this 26th day of January A. D. 1901.

JAMES REDDICK, *Clerk.*

Filed January 5, 1901. James Reddick, Clerk.

STATE OF ILLINOIS,
County of Cook, ss:

The People of the State of Illinois to all to whom these Presents shall come, Greeting:

Know Ye, That whereas, Edwin L. Brand late of the County of Cook and State of Illinois, died on or about the 25th day of December A. D. 1900, as it is said, after having duly made and published his last will and testament, a copy whereof is hereto annexed, leaving at the time of his death property in this state, which may be lost, destroyed or diminished in value, if speedy care be not taken of the same; and inasmuch as it appears that Ella A. Brand, Edwin L. Brand and Ella Belle Brand have been appointed
66 executors in and by the said last will and testament, to execute the same, and to the end that said property may be preserved for those who shall appear to have a legal right or interest therein, and that said will may be executed according to the request of the said testator we do hereby authorize them the said Ella A.

Brand, Edwin L. Brand and Ella Belle Brand as such executors to collect and secure all and singular the goods and chattels, rights and credits which were of the said Edwin L. Brand at the time of his decease, in whosoever hands or possession the same may be found, in this state and well and truly to perform and fulfill all such duties as may be enjoined upon them by the said will, so far as there shall be property and the law charge them and in general to do and perform all other acts which now or hereafter may be required of them by law.

JAMES REDDICK.

Witness Clerk of the Probate Court of said County of Cook, and the seal of said Court, this 26th day of Jany. A. D. 1901.

[L. S.] JAMES REDDICK, *Clerk.*

STATE OF ILLINOIS,
County of Cook, ss:

I, Guy Guernsey, Clerk of the Probate Court of Cook County in the State aforesaid, do certify that the within is a true and correct copy of the last will and testament of Edwin L. Brand deceased and of Letters testamentary issued thereon, on the 26th day of January A. D. 1901, to Ella A. Brand, Edwin L. Brand and Ella Belle Brand, as it appears from the originals on file, and from the records of the Probate Court in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Probate Court, at Chicago, in said County, this 15th day of September A. D. 1908.

GUY GUERNSEY, *Clerk.*"

67 Mr. MECARTNEY:

Q. I will add this document introduced in evidence just now mentions E. Belle Brand. What is her present name?

A. E. Belle Brand Atwell.

Q. When was her name changed to Atwell? When was she married?

A. About seven years ago, if I am not mistaken.

Mr. WALKER: Is the E. Mr. Mecartney an initial or is it a part of the word E-Belle?

The WITNESS: No, it is an initial.

Mr. WALKER: The letter E——

A. Stands for Ella—Ella Belle Brand Atwell.

Mr. WALKER: What is her middle name?

A. Brand Atwell, four names.

Mr. WALKER: That is her married name. She is married since then?

A. Yes.

Q. What is the size of the lot, of the premises in question?

A. 25 x 171.

Q. And that has been its size right along since this deed was given Mr. Brand, as you know?

A. So far as I know.

Q. What is the width of Wabash avenue in front of these premises?
A. About 100 feet.
Q. What is the width of the sidewalk on each side?
A. Twenty.
Q. And the width of the street?
A. Sixty.
Q. That is, you mean from curb to curb?
A. From curb to curb, the street.
Mr. WALKER: It is sixty feet.
A. I should judge it is; I think it is.
Mr. WALKER: That is your judgment of it?
A. Yes.
Q. The sidewalk——
A. About twenty feet.
68 Mr. WALKER: On either side, making 100?
A. Yes.
Mr. WALKER: From lot line to lot line?
A. Yes, from lot line to lot line.
Q. These premises lie on which side of Wabash avenue?
A. West side.
Q. Facing East?
A. Facing East, yes.
Q. Lie between what side-streets running west and east?
A. Jackson boulevard on the North and Van Buren on the South.
Q. Do you remember the construction of the Elevated railroad in Wabash avenue?
A. Yes.
Q. About what time was that structure started, if you recollect or in what year?
Mr. WALKER: When did they begin building—or after they started to operate?
Mr. MECARTNEY: When did they begin building?
Mr. WALKER: I object.
A. I guess the foundations were laid about a year or two before hand.
Mr. MECARTNEY: When he objects, wait.
Mr. WALKER: When the road was completed and ready to run trains, that date is material. When they started to build, I don't think is.
The COURT: Well as a matter of history I think it is competent, go ahead.
To which ruling of the court, counsel for defendant then and there duly excepted.
69 A. The exact date, I don't know, but it was about a year and a half, I guess before they started the steel that the foundation was put in; that is my recollection.
Q. When was the structure proper built?
A. In 1897, it was built.

Q. When was it completed and put to use, in what month in 1897?

A. It was in October, putting in the final——

Q. What roads commenced to use the structure?

A. The Lake Street L at that time.

Q. And what others did?

A. The south side and the Metropolitan. I think the Northwestern came in after. I am not positive.

Q. About what time was it when all the roads were using it, can you tell, about how long?

A. The three first roads I mentioned ran in the month of October, I think, all of them, the Northwestern commenced sometime later, I don't recollect exactly when.

Q. What time was the first train run over it, to your recollection, if you know?

Mr. WALKER: May we admit a date for you?

Mr. MECARTNEY: Yes.

Mr. WALKER: The operation began on the 3rd of October.

The WITNESS: Yes.

Mr. WALKER: 1897?

Mr. MECARTNEY: Yes.

Mr. WALKER: And then I think the three roads——

The WITNESS: ——followed.

Mr. WALKER: The three roads, the Metropolitan and South Side and Lake street were operating.

Mr. MECARTNEY: All followed a week or two later.

Mr. WALKER: Oh, no, but within—yes, they came right along, the Northwestern——

Mr. KNIGHT: Lake street operated on Wabash avenue to Adams street six months before.

70 Mr. MECARTNEY: We don't agree in the admission, so I guess we will have to let them out, unless the statement that the operation commenced October 3, 1897, that I think is correct. The first train ran along——

Mr. WALKER: Also operated, the Lake street operated around on Wabash avenue as far as Adams, not going around the Loop some six months about before the other lines began to operate when they did start to go around the Loop, they all went around the Loop at the same time.

Mr. MECARTNEY:

Q. To your recollection, what train first went around the Loop?

A. To my recollection, the Lake street was the first one.

Q. And what was next?

A. The South side, I think.

Q. And about how long afterwards in your recollection?

A. Oh, they were right succeeding a week or so. Between the third, I think, and the 15th, they all three run, operated.

Mr. WALKER: Of October?

A. Yes, October, 1897.

Q. Now, you may describe, in order to get into the record, al-

though we have seen it, this structure in front of the premises and immediately adjacent thereto North and South, this elevated railroad structure?

A. Well, it is a steel structure, starting with a point—it is on both sides of the surface line tracks, I should judge about twenty feet from the street curb or iron posts connected with the steel girders, running up, I should judge about thirty feet and then wooden ties with steel rails, totaling, I should judge about thirty feet high.

Mr. WALKER: Say thirty feet to the road bed?

A. From the street level.

71 Mr. WALKER: To the road-bed or to the top of the rail?

A. To the top of the rail.

Q. And over and on top of these rails, the trains?

A. The trains go.

Q. Trains operate?

A. Yes.

Q. Where are the up-rights so-called placed, that is the upright beams that support the structure?

A. They are placed, I should judge, about a foot or eighteen inches on the outside of the surface line tracks.

Q. They are how big, about, how much square are those upright posts or supports?

A. About a foot square, I think, something like that. Might be more.

Q. And how far, is your estimate from the curb line are they placed, about?

A. About twenty feet.

Q. When this road was first constructed and put in operation how were the trains operated over it, what motive power?

A. Steam power.

Q. Were all——

A. At the start, they were, If I am not mistaken.

Mr. WALKER: Metropolitan never ran with steam; always ran on the third rail.

The WITNESS: The Lake street was running and the South Side L had steam power locomotives.

Mr. MECARTNEY:

Q. Little engines in front of the trains?

A. Yes.

Q. And burning what?

A. Burning coal, I presume.

Q. Afterwards, what change, if any, was made in the operation?

A. Electricity; third rail system.

Q. How long did that steam operation continue on those two roads that you mentioned?

72 Mr. WALKER: Only on one.

Q. Or the one?

A. That I could not tell positively. I should judge about five or six months after the Metropolitan started.

Q. You may state the general connection of the Loop road and at what point that connected with these other roads?
A. The Northwest and the South——

Mr. WALKER: Pardon me.
Mr. MECARTNEY: Yes.
Mr. WALKER: Let him describe the streets and then he can——
Mr. MECARTNEY: I was going to do that too. Just state where the Loop road so called, what does it run on?

A. Well, it runs on Van Buren from Wabash to Fifth avenue: North on 5th avenue to Lake; East on Lake to Wabash; then South on Wabash to Van Buren.
Q. It connects with the Northwestern L at what point?
A. The Northwestern L connects at 5th avenue and Lake street.
Q. Lake street?
A. Yes.
Q. The Lake street L connects——
A. At the same point.
Q. The Metropolitan L where?
A. Van Buren and 5th avenue.
Q. The South side Alley L so-called?
A. At Wabash and Van Buren.
Q. Prior to the construction of this railroad in front of the premises in question, immediately prior thereto, what means of travel and conveyance were there to those premises?
73 Mr. WALKER: Public?
Mr. MECARTNEY: Public.
A. Cable cars on Wabash avenue.
Q. What other, in other streets near by?
A. State street.
Q. Cable on that?
A. Cable on State, yes.
Q. What street runs East of Wabash at this point?
A. Michigan avenue.
Q. What runs West?
A. State.
Q. You have mentioned the other North and South streets; how near is the premises to the nearest station of the Illinois Central?
A. I should judge about two and half blocks to the Van Buren street suburban station.
Q. What was the mode or method of operation of suburban travel on the Illinois Central at that time, immediately before the Loop went there?
A. It was steam.
Q. Steam, and was there any special suburban service on that road?

Mr. WALKER: You mean was there at that time?
Mr. MECARTNEY: Yes, at that time.

A. You mean express trains?

Mr. WALKER: I object to it.

A. Well, I am not familiar with the South side—with the Illinois Central.

The COURT: Is there an objection.

Mr. WALKER: Yes, but the witness has disqualified himself by saying he was not familiar.

Mr. MECARTNEY:

Q. You are not familiar with the operation of the Illinois Central suburban trains, do you want to be so understood?

A. No.

74 Q. Well, I have asked you about it?

A. I am stating that I know the suburban trains but as far as the express service, which I presume you mean, I don't know. I know they run express trains.

Q. I did not ask you about what express trains they run. I am only asking you the general character of the service at that time on the Illinois Central?

A. Suburban trains.

Mr. WALKER: I object to it as immaterial.

Mr. MECARTNEY: Just prior to the time this road went there.

The COURT: Let him ask the question.

Mr. MECARTNEY: Read the question.

(Question read.)

The COURT: What is the purpose of it.

Mr. MECARTNEY: I only want to show the ordinary travel facilities in this neighborhood of the property particularly, special service to the property. They will probably claim this Elevated Loop is the whole thing in the matter of transportation, so to speak in common parlance, and I want to show the facilities of travel *occuring* to the property immediately before this time and what facilities it had.

Mr. KNIGHT: That leads to the trial of an immaterial issue; it leads to the question of how many passengers get off at Van Buren street and how many get off at Randolph street. It is wholly immaterial. Blocks away from this property and he dont claim it had any effect upon this property.

Mr. MECARTNEY: We claim it does.

Mr. KNIGHT: Might as well ask where the Northwestern steam road which delivers their passengers at Wells street, what effect they had on the property.

The COURT: I think it is going a little too far, Mr. Mecartney.

Mr. MECARTNEY: It certainly is not immaterial, your

75 Honor, to show the facilities two and one-half blocks is nothing to walk from a station to business.

The COURT: The fact that the Illinois Central Railroad was carrying passengers, I think is sufficient, but I think to go into details——

Mr. WALKER: We will be over to the Rock Island in a minute that is about the same distance.

Mr. MECARTNEY: I am not going into details, but there was a definite suburban service.

The COURT: That there was, I think is competent.

Mr. MECARTNEY: And express trains and local trains and there was a station there and were frequent trains.

The COURT: A station there and trains running for the carrying of passengers is competent, but the character and extent of the trains and passengers, I don't think is.

Mr. MECARTNEY: In order to make the record, I will ask you approximately how frequently trains ran on the Illinois Central suburban service, both express and local at that time.

Mr. WALKER: I object:

The COURT: Sustained.

To which ruling of the court, counsel for Plaintiffs then and there duly excepted.

Mr. MECARTNEY:

Q. Now, prior to the construction of the Loop, where was the terminal of the South Side Alley L?

A. At Congress, in the alley between Wabash and State.

Q. After the construction of the Loop, what change was made in that terminus?

A. There was a connection made from Harrison street to the South Side L, up to Van Buren and touching the Loop at that point, connecting to the Loop.

76 Q. In other words, the main stem of the South Side L left the general track at Harrison street and went east on Harrison to Wabash and North on Wabash to connect with this Loop at Van Buren street?

A. Yes.

Q. Was that right?

A. Yes.

Q. Where was the terminal of the Metropolitan L, prior to this time?

A. That was over, I think, on Franklin street, if I am not mistaken.

Q. Do you remember between what streets?

A. Between, I think it was between Van Buren and Jackson.

Q. Where was the terminal of the Lake street——

A. On Market street—no, there was one branch on Market and I think there was another down—I think she run around on Lake street.

Q. On Lake street to where?

Mr. WALKER:

Q. What time are you referring to?

Mr. MECARTNEY: Right prior to the construction of the Loop, before this road was built on Wabash avenue, immediately before then where did the Lake Street L run to, as your recollection now is?

A. I think the Terminal was at Lake street. It might run up a block on Wabash, I don't recollect.

Q. At Lake and where, I mean?
A. Wabash.
Q. At Lake and Wabash?
A. Yes. They also had another terminal over on Market street.
Q. Mr. Florup, have you observed the effect of this Elevated road structure physical effect of it upon the uses of this property, of the Brand estate involved here?

77 Mr. WALKER: Objected to.
The COURT: What is the objection, Mr. Walker?
Mr. WALKER: Physical effect upon the uses, is the question.
The COURT: Isn't that in line with the opinion of the Appellate Court you have just handed me?
Mr. WALKER: Where the River cut off part of the ground, of course they could recover for loss of ground. That is where there was a washaway and if he means by this question, if I understand him, whether we cast cinders or soot when those steam engines went down there or whether we unnecessarily perpetrated vibration on the building that caused it to disintegrate or injure, that is one proposition. Otherwise he must direct himself. We don't touch this property, to the effect on its value—
The COURT: The rule seems to be laid down in this Appellate court opinion that the measure of damages, if it be damaged, is the depreciation in the market value of the property at the time of the construction of the road, but in order to demonstrate the effect of the construction and get the basis or value for the opinion of the witnesses, it is proper also to show what the real effect is as to how it affects the property.
Mr. WALKER: Physically.
The COURT: Physically. I think the question calls for facts asking him to describe in what manner it affects it. He may answer.
To which ruling of the court, counsel for defendants then and there duly excepted.

Mr. MECARTNEY: Answer the question.
78 A. In the first place, the noises, which are continuous and also the dirt and dust. The vibration has not a great deal to do with it, but the dirt and the noise is the most part of it.
Q. What other?
A. The light.
Q. The light, what do you mean by that, how is the light affected.

Mr. WALKER: What is it claimed? As the physical effect on the property by noise or does it jar the building or is it the effect upon the ear of the man in the building?
The WITNESS: It has an effect on the hearing.
Mr. WALKER: I move that be stricken out because it is evident the noise can't be a physical effect on the property.
The COURT: Let us hear what he has to say. What do you say; it has an effect on the hearing and what else.

To which ruling of the court, counsel for defendants then and there duly excepted.

A. It has an effect on the hearing in the premises, that is an effect on the renting of the premises for one thing. Another thing, the vibration in the building and the dirt and the light,—the light especially, for the ground floor. The second floor, it is more dirt and noise.

The COURT: Well, wait a minute.

Mr. WALKER: I move to strike out all that he has said about noise.

The COURT: I think at present the motion will be overruled. It may stand.

To which ruling of the court, counsel for defendants then and there duly excepted.

79 Mr. MECARTNEY:

Q. What effect, if any, direct your attention to the access to the premises and to the structure itself?

A. Well, it blocks kind of,—practically blocks traffic on Wabash avenue, except single wagons can only pass except they get in between, out between the girders or the uprights. It is almost impossible for two trucks to pass on twenty feet if they have got a load, or rather between the girders and the curb.

Q. At the time of the operation of this road by the steam engines, what effect,—what physical effect occurred to the premises and the use of the premises from that, if any, different from what you have stated.

A. Well, at that time Wabash avenue, right prior to the structure and also right after it was built was a large——

Q. No, I am asking you about the effect from the steam operation itself as distinct from anything that you have mentioned, if there was any different effect?

Mr. WALKER: You mean whether there was any different effect on the property, physically when the road ran steam engines than there is now when that same road runs with electricity?

Mr. MECARTNEY: Yes, I want to bring out——

The WITNESS: The effect was that carriage trade was almost impossible.

Mr. WALKER: I move to strike that out.

Mr. MECARTNEY: I consent that it be stricken out. I did not ask him about that.

The COURT: It goes out.

80 Mr. MECARTNEY:

Q. Is there any physical effect in the burning of coal and the operation by steam, was there while the premises were used in that way, while the structure was used in that way?

A. Not except the noise and smoke—we used to have the whistling of the engines and the smoke.

Mr. MECARTNEY: I would like to direct his attention—were there any ashes in the operation?

Mr WALKER: Objected to.

Mr. MECARTNEY: When there is an objection, you must not answer.

The COURT: He may answer.

To which ruling of the Court, counsel for defendants then and there duly excepted.

A. Yes, there was ashes.

Mr. MECARTNEY:

Q. Ashes how and where?

A. Right under the structure and at times would fly clear over the sidewalk, you could find them.

Mr. WALKER: I think he has gone far enough.

Mr. MECARTNEY:

Q. Immediately prior to the time this road went there, was constructed there, what was the general character of Wabash avenue in the block within which these premises are situated with reference to its trade uses?

A. Wholesale trade.

Q. What kind of wholesale trade or was there any particular character of wholesale trade at that time.

A. No, there was not any particular kind. There were all kinds on Wabash at that time, but they were crowding the grocers out and the retailers were coming over there. For that matter, Lyon & Healy and several concerns came over.

Q. What other concerns had come over there in a retail way?

81 Mr. WALKER: Well, of course I have no objection to it. It is all right, but Lyon & Healy, you directed his attention to this same block and now he has gone down to Adams street; but it is all right.

Mr. MECARTNEY: I meant just in this block or immediately——

A. I think at that time Kimball came over. They were on State street, if I am not mistaken.

Q. Can you mention any other large concerns that came there about that time?

Mr. WALKER:

Q. Aren't you going to confine yourself to that block.

Mr. MECARTNEY: I don't want to spread over much territory, I meant right in that block, the general neighborhood of Wabash avenue, as to its general character.

A. The block,—just about that time was forming from wholesale into retail and especially piano people was looking for locations over there, getting crowded off from State street.

Q. Immediately after the road went there—and I want to confine your attention to the first two or three years after it went there,

what was the general character of the trade on the street in that block, what if any changes?

A. There was practically——

Mr. WALKER: What a minute, I object to it, to confining it immediately after the road and then calling "immediate" three years, Judge—running along——

Mr. MECARTNEY: I might have taken a couple of years. Say two years after the road went there,—any particular change?

Mr. WALKER: I don't understand that we are limited to any period of time that the counsel on the other side happens to adopt.

Mr. MECARTNEY: No, it is a question for the Court—to limit the time.

82 The COURT: There is no change in the matter, go ahead.

A. Just after the road had started, say two or three years after the road, the street practically was at a standstill. There was nothing done down in there as far as renting went.

Mr. MECARTNEY: Yes, but I am asking if changes,—any particular changes?

A. No, no particular——

Q. In the trade of the street?

A. No.

Q. Now, Mr. Florup, and you collect the rents for those premises and negotiate leases in the years 1895,—1894, 1895, 1896, 1897 and 1898 and 1899 of those premises?

A. Yes.

Q. Can you state what those premises were rented for in the year 1894, were they rented to one person or to a number of persons in the year 1894?

A. Peck Brothers were in there in 1894.

Q. I am asking you, was one person renting the building in 1894 or was it rented to various tenants?

A. One firm.

Q. 1894; how was it rented in 1895?

A. The same way.

Q. How in 1896?

A. The same way practically, part of the year.

Q. How about 1897?

A. In 1897, part of the building was rented. That is, the ground floor was rented at that time, that is in 1897 the building was vacant practically.

Q. What time was the remodelling going on?

A. Between 1897 and 1898.

Q. Well, do you mean to say that the building was vacant during the whole of 1897?

A. Part of the time. I don't recollect the months but I know the most of the year.

Mr. WALKER: He said they were remodelling in 1897 and 1898.

Mr. MECARTNEY:

Q. State the rent of that building, on what terms the building was rented to Peck Brothers, as you say who leased it in the year 1894?

83 A. It was $6,000 a year.

Q. For the entire building?

A. For the entire building.

Q. What was the rent paid in 1895?

A. $7,500.00, I think it was.

Q. $7,500.00 a year?

Mr. WALKER: Has the witness the leases? If the witness has the leases, we would like them. That is the best evidence and we would like to see them.

Mr. MECARTNEY: We don't want to introduce all the leases.

Mr. WALKER: That is the proper way to prove rental, if they were leases.

A. There were leases in existence but I have got part of the records here because those old leases, we don't keep.

Q. You have got your rent book here?

A. Yes.

Q. Have you got it right there?

A. It is on the desk over there (indicating).

Mr. WALKER: Now, may I make an inquiry, is the amounts in those books the rent collected or what the lease called for. That is the point.

Mr. MECARTNEY: I am asking how much it was rented for.

The COURT: He can state what the rents were paid, if he remembers the payments.

Mr. MECARTNEY: I am asking what the rental,—the leases I am asking him what the leases were, for although not in those words, what was the rental contracts.

A. The rental contracts was $625.00 a month during the year 1895.

Q. Now, in 1896

Mr. WALKER: $625.00 per month for the whole building?

84 A. For the entire building, yes.

Q. $7,500.00 a year that would be?

A. $7,500.00 a year, yes, and during 1896 the same, part of the year.

Q. What was it, was there a contract for only part of the year?

A. Yes.

Q. When did it expire, the rental on the basis of $7,500. a year?

A. Well, there was a verbal agreement between Mr. Brand and the tenant at the time that they would get out almost at any time.

Q. When was it—was that contract or lease cancelled and that tenant moved out?

A. Yes.

Q. When was that?

A. That was during, I think it was during the fall of 1896, if I am not mistaken.

Q. When was the premises,—was the premises immediately afterwards, after that time rented?

A. No, it stood vacant quite a while.

Q. Was it entirely vacant, the whole building?

A. Yes.

Q. When did you commence remodelling it?

A. During the Fall of 1896,—no, just one minute.

Mr. KNIGHT: Can't you tell by your book?

A. No, I can't. The way this book is kept, Mr. Brand kept it himself, it is pretty hard for anybody else to tell.

Mr. KNIGHT: Were you in the employ of Mr. Brand that time?

A. Yes, in 1898 I have got it here.

Mr. WALKER: Well, now, Mr. Mecartney, I don't suppose the witness wants to be in error. He has that in 1896. I think he will find the Pecks were there up to the time of the remodelling, which was in 1897.

85 The WITNESS: No, they were not in there up to the time we started remodelling. The building was vacant quite a long time, I can state that, before we started remodelling.

Mr. WALKER: When did the Pecks go out?

A. They went out in November, 1896. I am almost positive it was November, 1896.

Q. At what time, in 1897 or 1898, whatever it was, was the remodelling completed?

A. It was completed around by the first of May.

Q. 1898?

A. 1898, yes.

Q. What did the remodelling consist of; in what way was it changed, the building and what floors.

A. The only remodelling was there was a passenger elevator put in there. There was already a freight elevator there and there was new floors put in and the upper floors that had been occupied for warehouses by the Pecks were plastered. Otherwise there was no——

Q. What extent, in money, if you know was the remodelling of the building—how much of a cost?

Mr. WALKER: That is immaterial. I object.

The COURT: I think it is immaterial.

Mr. MECARTNEY: I think it is material, your Honor, to simply show how much was put upon the building and then the rents afterwards because the subsequent rents would be——

The COURT: It might be cross examination, but it is not direct.

To which ruling of the court, counsel for plaintiffs then and there duly excepted.

86 Mr. MECARTNEY:

Q. To whom were the premises rented immediately after the remodelling?

A. To Wm. Camp, son of the Estey & Camp firm.

Q. For what purpose?
A. Piano business.
Q. How much of it was rented to him?
A. Store and basement.
Q. How long was it rented, for what term,—from when to when?
A. Camp got in there in May, I believe, of 1897.
Q. What year?
A. Of 1898, I think it was.
Q. And how long——
Mr. KNIGHT: Are you testifying from your own records or somebody's else?
A. From my own records—that is, Mr. Brand's records.
Mr. KNIGHT: That is objected to. Not made by you, were they?
A. No.
Mr. KNIGHT: Not made in your hand-writing?
A. No.

Mr. KNIGHT: I object to that.
The COURT: He may look at them for the purpose of refreshing his recollection.
Mr. KNIGHT: Not made by him, your Honor. Made by another person, stranger—dead person.
The COURT: I know, but he is not introducing the record in evidence and not, as I understand, telling what the record contains.
Mr. KNIGHT: Yes, that is what he is doing. He says by looking at the record made by somebody else, I find so and so.
The COURT: Is it that you, after looking at the record remember the fact itself independently of the record, or are you telling what somebody——
87 A. No, I simply refresh my own memory because part of this is in my own hand-writing and part is in Mr. Brand's hand-writing and when Mr. Brand was away in his summer resort, I kept the books there. That was all the book that was kept for that matter.

The COURT: I think you may state.
To which ruling of the court, counsel for defendants then and there duly excepted.

Mr. MECARTNEY:

Q. Now, when did Mr. Camp go in there?

Mr. WALKER: It is the rule here we must take our exceptions or may we have it understood on exception follows?
The COURT: Have it understood that there is an exception to every adverse ruling on each side.
Mr. WALKER: Follows the objection, the exception follows the ruling?
The COURT: All right.
Mr. WALKER: Is that all right, Mr. Mecartney?
Mr MECARTNEY: No, but I feel like yielding to the Court's mind, although my own experience is that it is not comforting and not the best——

The COURT: Oh, well, I think it is all right. Let it be understood there is an exception to every adverse ruling.

Mr. MECARTNEY: I don't want to singly object to it.

Mr. WALKER: You are taking the Court's rule that there is an exception every time and objection is made, an exception follows.

The COURT: Let it be so understood.

Mr. WALKER: All right.

88 Mr. MECARTNEY:

Q. When did Mr. Camp go in there, in that store, what year and what—about when?

A. He went in there in 1897, if I recollect right.

Mr. WALKER: 1897?

A. You must remember that the building was remodelled between 1897 and 1898. That was the upper part. The store was never remodelled to any extent and could be occupied without interfering with the upper part's remodelling.

Q. So Mr. Camp was there while the remodelling was going on?

A. Yes.

Q. And he started at what and was he in the store just?

A. He was in the store.

Mr. WALKER: Store and basement.

Mr. MECARTNEY:

Q. Store and basement?

A. His lease called for the store and basement, but he did not occupy the basement.

Q. What time, period of the year 1897 did he go there, if you know, or about when?

A. He went there, I think it was in the Spring some time—June, I should judge.

Q. What rental did he pay?

A. $350.00 a month, $4,000.00 a year.

Q. Who succeeded Mr. Camp to the use of the store and basement?

A. Chase brothers.

Q. When did they go there?

A. Chase Brothers Piano Company?

Q. Chase Brothers Piano Company?

A. They went there in 1898.

Q. What time?

A. I think it was May, 1898.

Q. What rental did they pay?

A. Their rental was $3,600.00.

Q. $300.00 a month?

A. Yes.

Mr. KNIGHT:

Q. Did you say Camp went in there in May, 1898?

89 Mr. WALKER: He changed that to May, 1897.

Mr. MECARTNEY: Said he was there during the remodelling.

Q. How long did Chase Brothers remain there?

A. Their first lease, I think, was a three year lease, from 1898 to 1901.

Q. And they paid $300.00 a month?

A. A month, $3,600.00 a year.

Q. And after the remodelling how were the premises occupied above the first story of the store?

A. The second floor was occupied by a sales room of piano-stools and scarfs.

Q. The second floor, how was that occupied?

Mr. WALKER: Who was the tenant there?

A. Saul Grollman.

Q. How many other tenants were there of the building?

A. Well, he was there for quite a while before the other part got rented. The next tenant that was in there was the Hamilton Manufacturing Company.

Mr. WALKER:

Q. What floor was that?

A. The fourth.

Q. How long after the completion of the Elevated road or after the remodelling of the upper part of the building was it until that floor was rented, or about how long?

A. I should say about eighteen months, between a year and eighteen months.

Q. How many of the floors above the first floor were actually rented within a year after the road was completed, I mean the first year after the road was completed or after the remodelling, say within a year after the remodelling was completed, how many of the upper stories were rented and how many were vacant?

90 A. Two vacant and two rented.

Q. What was the total rent of those premises, of all the premises, if you can tell, for the year 1898, or the year beginning May first, 1898 and ending May 1st, 1899, whichever way your books run?

A. The second floor the rental was $80.

Q. A month?

A. A month. The third floor was $60.00. That was the only two floors that was rented during the year of 1898, of the upper part.

Q. With the Chase Brothers' lease of $300 a month——

Q. Added.

Q. With the second floor at $80.00 a month and the third floor at $60.00 a month, that represents the total income for the first year after the building was completed.

A. Yes.

Q. Or remodelled. Take the second year after the building was remodelled. Can you give about what the rents of the building were then?

Mr. WALKER: That from May, 1899?

A. To 1899.

Mr. WALKER: To May, 1900?

A. The rental then was $400.00 above the first floor and $300.00 for the ground floor, total of $700.00 a month.

Mr. WALKER: That $8400.00 a year?

A. $8400.00 a year and we operated the building. When the Peck Brothers had it, Peck Brothers operated the building.

Mr. WALKER: Wasn't much to operate when they didn't have an elevator.

A. There was an elevator.

Mr. WALKER: Operated by stationery stairs.

91 Mr. MECARTNEY:

Q. Mr. Florup, do you know when the motive power on Wabash avenue was changed from cable to electricity?

A. It was only here—no, I don't. I judge about three or four years ago. It was recently here.

Mr. KNIGHT: Have you got any of Brand's memoranda to tell you about that.

A. No.

Mr. MECARTNEY:

Q. Mr. Florup, were you acquainted in 1894, 1895 and 1896, immediately before the road was constructed here, with the blocks, the various property in the blocks adjoining this block, say, or in the general neighborhood?

A. Yes.

Q. Did you have occasion from time to time to observe rents and sales of property in that neighborhood.

A. Yes.

Q. Were you familiar with the character and value and of rents generally in Michigan avenue opposite this block in question—the corresponding block on Michigan avenue—at that time?

Mr. WALKER: Objected to as immaterial.

Mr. KNIGHT: On Michigan avenue, different character of property, and different location.

Mr. WALKER: A block on Michigan avenue, the same block. I take it the court will take notice of the fact was the Stratford Hotel and on Van Buren street it was the Victoria and the Richeliu was in between except when the Karpe[illegible] Furniture Company man came in there. There wasn't any similarity where there was a Boulevard and nothing on the other side of the street.

The COURT: What do you mean?

Mr. MECARTNEY: I am only going to ask him the general development on corresponding streets on State and Michigan which
92 are the two nearest streets to this, before this improvement went there and then the corresponding values afterwards,—the next couple of years afterwards. It is for a guide in elevated railroad values, which we have studied.

Mr. WALKER: What case?

Mr. MECARTNEY: In order to show the effect. If these gentlemen, of course, are going to object to showing the value of the

adjoining streets, they will have to be estopped from showing any values on Wabash avenue outside of this particular street. The current of trade and the current of value, both before and after the improvement went upon the premises, I take it, has some bearing upon the question what market effect the improvement had upon it. It indicates nearly as much as the improvement itself upon the direct property. I propose to show by the witness at that time this block was fast transforming into retail trade and high-class property and the other two were inferior and that afterwards the other two went ahead of this and this remained, as he says, stationery, for quite a while.

Mr. WALKER: My particular objection is based upon the fact that the question was directed to Michigan avenue. That is the question we made the objection to first and then he has shown no similarity between the property on the two streets and until he does that, the witness will testify that Wabash avenue—he asked for this block between Jackson and Van Buren, especially, as hotel block, asked if it was similar to Wabash avenue, where there is not a hotel and was retail stores. That is an entirely different matter.

93 The COURT: If you have a decision in the Supreme Court saying it is proper to consider the value of land in parallel streets in the City——

Mr. MECARTNEY: There isn't any in this State, because those Elevated cases have not reached there. When I said Elevated road cases, I referred to New York where there have been a great many decisions upon it and, we, of course, take the position that it is not the most important evidence, but it is relevant, I take it that the other gentlemen are going to try to go largely on that.

The COURT: It seems to me that at the present stage of the case that to interject into the case a trial of the values upon State street and Michigan avenue and other streets not in physical contact with this street itself would not be competent because it immediately raises another issue,—Michigan avenue, the question as to the situation of Michigan avenue.

Mr. WALKER: Similarity——

The COURT: The reason for the rise or decrease in values along Michigan avenue on State street, the reason for the depreciation or appreciation of values there. It raises different issues and different trials and it would not necessarily prove or tend to prove the issues in this case.

Mr. MECARTNEY: Well, your Honor is just following on the heels almost the exact language of one of the Justices that holds that when it came to showing value of specific property—which I did not mean to do on either of these other streets, but the general course of value was my proposition could be taken. That is what——

94 The COURT: I don't see how you could take the general course of values on those streets without considering specific instances.

Mr. MECARTNEY: Let me ask him another question and then I will make a record on it.

The COURT: For the present then the objection to this question is sustained.

To which ruling of the court, counsel for plaintiffs then and there duly excepted.

Mr. MECARTNEY: Q. Now, I ask the witness, your Honor, what was the general character of Michigan avenue in the block east from this, between Jackson and VanBuren with reference to—was there any difference in the general character of the Michigan avenue block of property on the Michigan avenue block between Jackson and VanBuren and the character of the property on this particular block on Wabash avenue prior to the time this road was constructed?

Mr. WALKER: That is objected to.

The COURT: I think you may show what the general character of the business was.

A. Retail stores at that time, retail and wholesale and hotels.

Q. On what street are you referring to?

A. Michigan avenue.

Q. On Michigan avenue?

A. In that particular block.

Q. And in this particular block, you state that it was transforming from wholesale to retail?

A. To retail, yes.

Q. Well, what was the general character of State street in that same corresponding block?

Mr. WALKER: Objected to.

The COURT: He may answer.

To which ruling of the court counsel for defendant then and there duly excepted.

95 Mr. KNIGHT:

Q. What time are you referring to?

Mr. MECARTNEY: At that time, right immediately prior to the time the road was constructed on Wabash avenue?

A. Retail—hotels upstairs and retail on the ground floors.

Q. What was the general character of the——

Mr. KNIGHT: What hotel was there between Jackson and VanBuren.

A. Cheap hotels.

Mr. MECARTNEY:

Q. Cheap hotels?

A. Cheap hotels.

Q. What kind of stores?

A. There was on the west side; on the east side of the street there was furniture stores and on the west side of the street——

Mr. WALKER: I object to this, these opinions.

The COURT: Yes.

Mr. MECARTNEY: All right.

Q. What was the general character of the trade?
A. Retail, cheaper class of retail.
Q. Cheaper class of retail. How did it compare with the trade on Wabash avenue at that time?
A. Wabash avenue at that time had a better class of people, better class of business houses than State street had.
Q. You say you were acquainted at that time with the values of property in the vicinity of this property in question.

Mr. WALKER: I have not heard him say so. Maybe he did.

Q. Yes, I asked him a while ago, were you acquainted at that time?
A. Yes, I was acquainted somewhat.
Q. With the value of property in the vicinity. Now, I want to ask you did you know at that time the value of property upon Michigan avenue within this same corresponding block?

96 Mr. WALKER: That is objected to.
Mr. MECARTNEY: That I have mentioned.
Mr. WALKER: As immaterial.
The COURT: He may answer.
To which ruling of the court, counsel for defendant then and there duly excepted.

Mr. MECARTNEY:

Q. Did you know, yes or no?
A. Yes.
Q. Did you know the value of State street property in the block we have just mentioned, the corresponding block west of this property?

Mr. WALKER: That is objected to.
The COURT: He may answer whether he knew.

A. Yes.

Mr. MECARTNEY:

Q. I will ask you what the value on Wabash avenue of these premises in question were, immediately prior to the time the road commenced building on Wabash avenue?

Mr. WALKER: Building now?

Mr. MECARTNEY:

Q. Commenced building on Wabash avenue.

Mr. KNIGHT: I don't think, if the Court please, he has shown qualification as an expert. He might get his value from the Board of Review values or by the Assessor's values or by newspaper accounts, or something else. He has not shown that he had anything to do with a single transaction in Wabash avenue between these points without he knows anything about them. He first asked him if he was acquainted. He may be acquainted with the property and even then not know the name of the owners. He follows that by

asking him what the value was. I don't think he has sufficiently shown that he is qualified.

The COURT: I think he may answer.

To which ruling of the Court counsel for defendant then and there duly excepted.

97 A. Yes.

Mr. MECARTNEY:

Q. State what the value of these premises were at that time?

Mr. KNIGHT: How old are you?

A. I am forty-four.

Mr. MECARTNEY: You may answer. Read the question.

(Question read.)

A. The value of the premises during 1897, 1896 and 1897?

Q. Right before the road commenced building there, immediately before the road commenced building?

Mr. KNIGHT: That is objected to, immediately before the road commenced building. He stated the road was built there in 1895 and 1896 and up to 1897, this suit was not begun until the day before the statute of limitations expired.

Mr. WALKER: Nearly five years.

Mr. KNIGHT: Can't account for things during the construction of the road.

Mr. MECARTNEY: I am not trying to.

The COURT: The question does not call for that; he says immediately before they commenced building the construction of the road. I think that is proper.

Mr. WALKER: That takes it back to 1896.

The COURT: Go ahead.

To which ruling of the court, counsel for defendant then and there duly excepted.

Mr. MECARTNEY:

Q. What was it?

A. About $4800.00 a foot.

Q. About $4800.00 a foot?

A. In 1896.

98 Q. What, if anything, would you allow for the value of the building at that time?

A. I think the value of the building was about $20,000—$15,000.00 to $20,000.

Q. Were you acquainted with the value of this property and property in that vicinity immediately after the road was built and for several years thereafter?

A. Yes.

Q. State what the value of these premises in your judgment was immediately after the road was built?

A. They were at the same—standstill.

Q. The same value, you mean?

A. The same value, yes.

Q. About how long, in your judgment, did that same value continue?

A. About 1892. I think it was 1892,—1902.

Q. Well, I did not mean to cover more than three years; let us say 1897 I would like to call it. How long did it continue, say within a period of three years or did it—of course he has answered now, it covered at least three years. I don't mean to cover in my examination a longer period than that, your Honor, and I would like to have it some way——

Mr. WALKER: What was his answer?

(Last answer of the witness read.)

Mr. MECARTNEY: 1902, he said.

Mr. WALKER: Makes five years.

Mr. MECARTNEY:

Q. Take a period for three years after the road was completed, was there any change in that value for those three years?

A. No.

Q. Now, do you know, I think you have stated, but I will ask you again the value of Michigan avenue property in the corresponding block west immediately before this structure in Wabash was commenced?

99 Mr. WALKER: Objected to.

The COURT: Sustained.

To which ruling of the court, counsel for Plaintiffs then and there duly excepted.

Mr. WALKER: Now, I think your question was a little in error; maybe you want to make that East; you called it West.

Mr. MECARTNEY: Immediately East, corresponding block between Jackson boulevard and Van Buren street, I will ask you if you knew the value of property on the State street block, the corresponding State street block, between Jackson boulevard and Van Buren street, and west of this property there, immediately before the commencement of the building of the structure in Wabash avenue, just answer yes or no.

Mr. WALKER: Objected to. You have asked him what the values were on State street immediately west of Wabash avenue in the same block where this property is situated and I have objected to it.

The COURT: Objection sustained.

To which ruling of the court, counsel for plaintiffs then and there duly excepted.

Mr. MECARTNEY:

Q. I will ask you what——

Mr. WALKER: I thought you asked him what it was and he has already testified, over my objection, that he did know the value of State street.

Mr. MECARTNEY: Then I will make the question read this way: What was the value?

Mr. WALKER: Objected to.

Mr. MECARTNEY: On State street, etc.

Mr. WALKER: Objected to.

The COURT: Sustained.

To which ruling of the court, counsel for plaintiffs then and there duly excepted.

100 Mr. MECARTNEY: Of course, I want to state the purpose then of that question, if that question was allowed to be answered by showing the value immediately after the road was constructed but as the question is ruled out, I take it there is no use in asking the other questions because I would not want them in without the first.

Q. When was Jackson boulevard, if you remember, established?

Mr. WALKER: You mean when?

Mr. MECARTNEY: That is to say when was the Boulevard established on Jackson street, if you remember?

A. I think it was 1899, if I am not mistaken; about ten years ago, I guess.

Q. The Boulevard on Jackson street connects with the Boulevard on Michigan avenue, doesn't it?

A. Yes.

Q. And it is under control of—

A. South Park system.

Q. The South Park system.

A. Yes.

Mr. MECARTNEY:

Q. Now, if the Court will bear with me to check up just a moment or two I think it better, on the suggestion of my associate to state that the purpose of these last questions in regard to values upon Michigan avenue and State street were for the purpose of showing that the values on these side streets were less immediately before the road went there than Wabash avenue and immediately after, were greater. It was possibly covered by some of my earlier suggestions but that was the purpose of it.

Q. Mr. Florup, during the year—the latter part of 1897 and 1898 I will ask you whether there was a change in 1898, any change generally in the real estate market of the City?

101 Mr. WALKER: That is objected to.

The COURT: He may answer.

To which ruling of the court, counsel for defendant then and there duly excepted.

Mr. MECARTNEY: The general real estate market or rents in general over the City.

Mr. WALKER: Objected to.

A. Yes, there was a depreciation I think in rents more or less.

Mr. WALKER: 1898?
A. Yes.

Mr. MECARTNEY:

Q. Was there any change in the condition of the times generally in 1898 or thereabouts—business generally, business change, and if so what?
Mr. WALKER: He says it was worse.
Mr. MECARTNEY: I asked the market values.
The COURT: Market value of real estate.
Mr. MECARTNEY: He mentioned 1898. In the general business conditions was there any change that you recollect in that year, marked change of general business conditions in 1898?
A. No. I don't——
Q. When, if any, did the change—was there any change in business conditions.

Mr. MECARTNEY: Well, I will withdraw the question. I guess you can take the witness.

102 Cross-examination.

By Mr. WALKER:

Q. Mr. Florup, are you the agent now for the Brand estate in their real estate transactions?
A. Yes.
Q. What?
A. Yes, sir.
Q. And for the plaintiffs, all of the plaintiffs in this case?
A. Yes, sir.
Q. A little louder, please?
A. Yes, sir.
Q. When did you first go to work for Mr. Brand, I mean now the old gentleman?
A. I think it was in 1885.
Q. 1885?
A. 1885 or 1886, something like that.
Q. And in what capacity did you work for him?
A. An errand boy.
Q. In his photograph gallery?
A. Yes, sir.
Q. That was on the east side of Wabash ave., between Adams and Jackson st.
A. Yes, sir.
Q. I noticed when we went down today with the jury on the upper floor of this building, what appears to be, at the rear end, a north skylight. Was that a photograph gallery at one time.
A. Yes—not a photograph gallery. It was an engraving concern.
Q. Mr. Brand never had his place of business there?
A. No.
Q. Was it in 1884 that you went to work as an errand boy?
A. No.

Q. That you went to work for him as an errand boy?
A. No, I said 1885 or 1886.
Q. Now, the purchase of this property was in 1889?
A. 1889.
Q. When did you cease being an errand boy after you went to work in 1885 or 1886; did you quit being an errand boy after 1886, how many years?
A. I started in the photographic part of it about six or seven months after I went to work there.
103 Q. That would be sometime in 1887?
A. 1887.
Q. How long did you continue in the photographic department of Mr. Brand's business?
A. Until his death and after.
Q. Well, he died when?
A. 1900.
Q. What month?
A. Christmas day.
Q. Come three years and two months—over two months after the railroad was in operation on Wabash ave.
A. Yes.
Q. What did you do in the photograph gallery; what were your duties when you started to work after that six months and quit being an errand boy?
A. General finishing and also attending to Mr. Brand's private affairs.
Q. Well, what do you mean by general finishing?
A. Finishing of photographs.
Q. What were your hours in that business; I am not talking about Brand's private affairs, I mean as a finisher?
A. From seven in the morning until six in the evening.
Q. You worked at your business of finishing photographs?
A. No.
Q. I asked you what were your hours in the finishing business?
A. That is pretty hard to say because I worked with Mr. Brand's private business in between times.
Q. Between what times?
A. During them hours, seven in the morning and six in the evening.
Q. Can you give me what portion of the day from seven in the morning until six in the evening you would be engaged at the photograph business?
A. Depended upon the weather. If it was a bright day, I would be perhaps all day on it. A dark day, I would be doing Mr. Brand's work.
Q. So that the private business would be done when the light wasn't in a condition for your finishing at your trade at proofs——
104 A. Yes.
Q. Whatever it was.
A. Yes.

Q. Well now, can you approximate, about how many days in the year say you would be on Brand's private business. You did not work on Sunday did you?

A. Yes, sir.

Q. At which, the photographs or private business?

A. Photographs.

Q. Now take the other days, about how much time did you spend in his private business?

A. The first year or so that I was doing finishing, I was practically at it all the time.

Q. That would be to the year 1887?

A. To 1887.

Q. Now, well up to 1888, or 1888?

A. In 1888 I commenced to take care of his real estate.

Q. In 1888?

A. Yes, collecting rents.

Q. That is you collected the rents?

A. Yes.

Q. You did not draw leases did you, in 1888?

A. I drew them, yes. I commenced during the latter part of 1888 to draw leases.

Q. In the latter part of 1888 you commenced to draw leases?

A. Yes.

Q. Was there any other real estate agent that had charge—or any real estate agent that had charge of Mr. Brand's property?

A. You mean exclusively?

Q. No, anybody?

A. No.

Q. Were the properties rented from Mr. Brand's private office?

A. Private office, yes, sir.

Q. From his private office where his photograph gallery was?

A. Yes.

Q. And now how many properties and what were they that you began to collect rent from in 1888?

A. There was Jackson blvd.——

105 Q. Now just a minute. Whereabouts on Jackson blvd.?

A. 73 and 75 Jackson.

Q. Between what streets was that?

Q. That was between State st. and the Great Northern—and Dearborn, on the north side of the street.

Q. On the north side?

A. Yes.

Q. Was that called a Brand building?

A. No sir.

Q. Was there a photograph gallery there?

A. No.

Q. Do you remember what sort of improvement of a building that was?

A. Same building was there as at the present time.

Q. The same that is there now?

A. Yes.

Q. That is a four or five story building.

A. Five story building.
Q. And how many feet frontage?
A. Fifty.
Q. How many tenants were there when you began collecting rent?
A. I think there was seven tenants if I am not mistaken.
Q. Is that property still in the Brand estate?
A. Yes.
Q. You still collect from that?
A. Yes.
Q. As their agent?
A. Yes.
Q. What other property in 1888?
A. 102 Van Buren street.
Q. Whereabouts is that?
A. That is between Federal street or Federal Court, whatever you call it and Clark street, on the south side of Van Buren.
Q. Is that west of Clark street?
A. No, east of Clark.
Mr. KNIGHT: South side of the street?
A. Old Fourth avenue, between Fourth avenue and Clark street on the corner of the alley.

Mr. WALKER:

Q. On the south side of Van Buren?
A. Yes.
Q. Do you know when he bought that?
A. No.
106 Q. What sort of a property, what sort of improvement was that and how many tenants in 1888, I am speaking of now?
A. I think there was three tenants. The building was a one story building and basement.
Q. What was the business there?
A. Why, one was a saloon, I think, at the time and a tailor shop I think in the basement—no, in the basement there was a shoe shop.
Q. How much frontage was there on Van Buren st.?
A. Fifty—no, forty.
Q. What other property in 1888?
A. There was 394 Dearborn.
Q. 394 Dearborn?
A. Yes.
Q. Where was that?
A. That is between Harrison and Polk, on Dearborn, on the west side of the street.
Q. You had nothing to do with the purchase of that?
A. No.
Q. How much property is there?
A. 25 x 66.
Q. How was that occupied, say in 1888?
A. By a hotel.

Q. 25 x 66?
A. I think there was a hotel.
Q. Same improvement on that property now as there was then?
A. Yes, that is I don't know, it might have been torn down the last couple of days.
Q. What sort of hotel was that on Fourth ave. in 1888?

Mr. MECARTNEY: I guess we are getting away from the issues, your Honor, but he can tell.
Mr. WALKER: We all know what it was.
Mr. MECARTNEY: I withdraw the question.
Mr. WALKER: I want to — the man's familiarity with business and this real estate. Oh, well, we will pass it.
Mr. MECARTNEY: The objection is withdrawn.
The COURT: Oh, for goodness sake, go along.

107 Mr. WALKER:

Q. What other property besides this property on Dearborn street south of Harrison was there in 1888 that you were collecting rent from?
A. 1223 Wabash.
Q. That is south of Twelfth street?
A. Yes.
Q. On Wabash?
A. Yes.
Q. How much was there, how many feet, how much ground.
Q. There was fifty-three feet there.
Q. Same improvement now as it was then?
A. No.
Q. What was on it then, how many tenants?
A. I think it was four tenants in there, four or five tenants. I am not positive.
Q. There were——
A. Pardon me, Mr. Walker, I wanted to state that I did not collect from those places continually. There was another man at the time that switched off.
Q. There were times, from 1888 on, that you did collect the rent?
A. Yes.
Q. There were times?
A. Yes.
Q. So that you knew something about the rents of those places?
A. Yes.
Q. Did you give me the number of feet on Wabash avenue?
A. I think it was fifty-three feet, fifty-two and a fraction.
Q. Which side of the street is that?
A. East side.
Q. You had nothing to do with the purchase of that property?
A. No.
Q. Know nothing about that?
A. No.
Q. That property backs up against the elevated railroad don't it.
A. No, it is on the east side of the street.

Q. It is on the other side. There is a new improvement on that now?
A. Yes.
Q. Did you have anything to do with that improvement?
A. Yes.
Q. When was that put up?
A. The last year—this year January.
108 Q. And you collect the rents now for that?
A. Yes, but there is nobody in there.

Mr. WALKER: I beg your pardon, I did not hear that witticism. (Answer read.)

Q. It is just a new building?
A. Yes.
Q. No elevated road in front of that?
A. No.
Q. And nobody in there. Well, now, what other property was there beside that in 1888, besides those that you have named of the Brand estate?
A. 71 and 73 Twenty Second street, 75 Twenty second street.
Q. Whereabouts is that?
A. That is on the south side of the street, between Prairie and Indiana.
Q. South side, that is business property on Twenty second street?
A. Yes.
Q. How many feet front?
A. Eighty five ft.
Q. Same improvement that was there then?
A. No.
Q. That has been improved?
A. Yes.
Q. When was that improved?
A. Right before the Fair part of it was improved and after the Fair the other part was improved.
Q. Any other property in the Brand estate at that time?
A. 314 State street.
Q. Whereabouts is that?
A. Right opposite Congress street.
Q. How much is there?
A. 25 x 110 I think it was.
Q. Same improvement there now that was then?
A. Yes.
Q. Anything else in 1888?
A. I collected the rent from the premises, we occupied 210 and 212 Wabash too.
Q. That you occupied?
A. Mr. Brand did not own that. He had a lease on that, just a lease hold.
Q. Long term?
A. Just a leasehold.
Q. Has the estate that leasehold now?
A. No.

K. Anything else?

A. Not that I recollect.

109 Q. Now, when did you become the exclusive agent, if there was any time, outside of Mr. Brand himself, for the Brand property?

A. There never was an exclusive agent.

Q. Well, who has the general charge now of the Brand real estate?

A. Mr. Brand, Jr.

Q. When did he take charge?

A. At his father's death.

Q. So that both during the father's lifetime and since his death, you worked either under the father as the head of the business for the son?

A. No, I have worked under the son and the trustees, the other two trustees.

Q. Who are they?

A. Edwin L. Brand and Ella Belle Brand Atwell.

Q. Who are also the executors?

A. Yes.

Q. Since the estate was closed up, you are working under the son?

A. No, I am working under the trustees.

Q. The mother, Mrs. Brand and the two children?

A. Mrs. Atwell, yes.

Q. Now, you remained with Mr. Brand in the photograph business until the time of his death?

A. Yes sir.

Q. Is there any photograph business now running?

A. No sir.

Q. When did they cease to, or the family cease the photograph business?

A. In 1905.

Q. And did you work with the family up until then?

A. Yes.

Q. Up to 1905?

A. Yes sir.

Q. And your real estate transactions from then until this?

A. Yes sir.

Q. To 1905, had reference to your business and connection with the Brand property?

A. Yes sir.

Q. You did not buy and sell real estate on commission?

110 A. No.

Q. You did not do a real estate business in a general real estate way?

A. No.

Q. But you were Mr. Brand's errand-boy and rent collector and all-around confidential man in his property, as you developed, developed from a boy up; is that right?

A. Yes.

Q. Are you in the real estate business now?
A. Yes.
Q. Other than the Brand estate?
A. No.
Q. So that your real estate business and your knowledge on that subject matter has been confined, as far as actual transactions go to your collecting rents and renting and taking charge in the way of the property of the Brand estate?
A. Well, as far as actual transaction goes——
Q. Yes.
A. I have done no——
Q. Well, that is what I mean. Now, what other properties were there that were acquired by the Brands other than you have stated since 1888 and up to the date of Mr. Brand's death?
A. There was 1420 and 1422 Wabash avenue.
Q. Which side of the street was that on?
A. That was on the west side of the street.
Q. That backs up against the Alley L.
A. Yes.
Q. When did Mr. Brand acquire that?
A. I think it was in 1890 or 1891.
Q. That was acquired in Mr. Brand's lifetime?
A. Yes.
Q. Well, he died in December 1890?
A. 1900.
Q. December 1900; he bought that in 1891?
A. I think it was in 1890 or 1891, I am not positive.
Q. And the Alley L was being constructed then at the rear of that property?
A. Yes.
Q. How many feet are there on Wabash avenue at that point?
A Fifty.
Q. Is the improvement the same as it was then or did Mr.
111 Brand improve it?
A. He put on it——
Q. What did he put on it?
A. Store fronts.
Q. What is above?
A. Flats.
Q. Do you remember what the height of that building is?
A. Four story building.
Q. It is a dwelling house, flats, above the store-fronts?
A. Above the store-fronts.
Q. Backing up right against the Elevated railroad?
A. Yes.
Q. What else besides this present piece that he bought in 1889?
A. He bought 1610 Michigan avenue.
Q. What is that, how many feet?
A. 25 x 170, I think it is—165 or 170.
Q. Any change in the improvement on that?
A. Yes.
Q. What is there?

A. Two story building there, commercial.
Q. That developed with the automobile business?
A. Yes.
Q. That property is used——
A. It is used down there but it was developed before the automobiles came there.
Q. That is what number?
A. 1610.
Q. Within a few feet comes the steam railroad that runs East and west.
A. Yes.
Q. And the elevated across Michigan avenue?
A. Not at that point. There was one further South.
Q. Yes, but that railroad is elevated across Michigan avenue?
A. Yes.
Q. And the structure there looks like an elevated structure as you come along?
A. Yes.
112 Q. What else besides this on Michigan avenue?
A. There was 1830 Wabash.
Q. What is that?
A. Twenty-two feet.
Q. Has there been any change in the improvement of that?
A. Well, we sold it, no improvement of it.
Q. That backs up against the alley L?
A. Yes.
Q. What else?
A. Armour avenue.
Q. Whereabouts on Armour?
A. 22nd.
Q. That still owned by the estate?
A. No.
Q. Why smilest thou?
A. What is that?
Q. Never mind. On which side of Armour and 22nd is this piece?
A. Northwest corner.
Q. Same improvement is it as there was before?
A. No, we improved it and sold it.
Q. What did you build there?
A. Three story buildings.
Q. Brick store down stairs?
A. Yes.
Q. Hotel up?
A. On that order.
Q. Yes, on that order. How many feet frontage are there.
A. 26 x 66, I think it was.
Q. Any other piece?
A. La Salle and 22nd.
Q. How much is there at La Salle and 22nd in the Brand estate?

A. 25 x 80; but that has been disposed of of late.
Q. All right, that is disposed of. Did you take part in that sale?
A. Pardon me?
Q. Did you take part in that sale?
A. Yes.
Q. Was that made during Mr. Brand's life-time or succeeding his death?
A. That he bought it or sold it? He bought it during his life-time and we sold it after his death. The same thing with Armour avenue.
113 Q. Have you sold the Armour since his death?
A. Yes, and also 394 Dearborn; also part of the Wabash avenue has been sold.
A. Any other pieces?
A. Yes.
Q. Where?
A. 35th street.
Q. Own that yet?
A. Yes.
Q. Any other—where is the 35th street property?
A. It is East of the Doolittle School, 200 feet, adjoining the Doolittle school on the East.
Q. That is near Cottage Grove avenue, down in there?
A. It is between Cottage Grove and the Doolittle school.
Q. Any other piece?
A. Not that has been bought since his death or since——
Q. Any other that is in the estate?
A. Yes.
Q. That you have had charge of?
A. Yes.
Q. What I am trying to show, Mr. Witness, is your experience and how many pieces there are altogether that you have had charge of in the Brand estate?
A. 2450 Calumet avenue.
Q. That is part of the Brand estate?
A. Yes.
Q. What is that residence or business?
A. Business, we just finished building there a year ago.
Q. What is in there?
A. Walker-Gordon Laboratory.
Q. Two stories?
A. One story in front and two in rear.
Q. That is milk business?
A. Yes.
Q. The sterilized milk concern?
A. Yes.
Q. About 100 feet there, or more or less?
A. Seventy five.
114 Q. What else.
A. I think that winds it up. There is the homestead 1818 Michigan Avenue which is vacant at the present time.

Q. There is the homestead property on Michigan avenue, where?
A. 1918 Michigan.
Q. Well, that property has changed, as a matter of fact from residence to business property, has it not?
A. Yes.
Mr. KNIGHT: 296½ South Clark.
A. 296½ South Clark; that is correct, that is another one.
Q. What is that 296½ South Clark?
A. Three story building there,—four story.
Q. Has that been changed or been altered?
—. That has been changed during Mr. Brand's life-time.
Q. You consulted him?
A. Yes.
Q. 394. Dearborn, did you give me that?
A. Yes, I gave you that.
Q. That is right near Harrison; that is right at——
A. Between Harrison and Polk.
Q. Now, what building anywhere between Van Buren and Lake street-, on either side of Wabash avenue, except the Brand lease where the photograph gallery was on the East side of the street and this present building have you ever had anything to do with?
A. None of them.
Q. What sale or long-term lease have you had anything to do with—I am eliminating now the two Brand pieces, the leasehold where the photograph gallery is and this present building, anywhere on Wabash avenue to Van Buren street?
A. You mean directly connected with the leases?
115 Q. Yes.
A. None.
Q. Have you anything to do with them, long terms or sale or fee?
A. None.
Q. You never had anything to do with any property on Van Buren street where the road runs other than this one Brand piece that you gave us west of Clark.
A. No.
Q. Nor any on Fifth avenue, in all your experience?
A. No.
Q. Nor any on Lake street?
A. No.
Q. How long have you lived in Chicago?
A. Since 1885.
Q. Since 1885?
A. Yes sir.
Q. Well the building that now stands on the Brand property was on there and has been on there ever since you became acquainted with Chicago?
A. Yes.
Q. Hasn't it?
A. Yes.
Q. Have you received any information from the Brand estate or

otherwise as to when that building was constructed or about when it was?

A. I know the building was constructed right after the fire.

Mr. WALKER: And the fire, I guess it will be admitted, Mr. Mecartney, was in October, 1871.

Mr. MECARTNEY: Right.

Mr. WALKER: You gave the condition or what the improvement was on Van Buren street of the Brand property before the Elevated road came there. You gave the building as being a saloon and something.

A. Yes.

Q. What improvement is on it and has been put on it since the elevated road came on the street?

116 Mr. MECARTNEY: I guess we will object at this point to going into other details of property. This leads into unduly wasting time.

Mr. WALKER: Oh, no, I am not trying to do that. I want to show the number of leases. This man has qualified and gave evidence as an expert as to the values on Wabash avenue. I am showing all he had to do on earth, is with the Brand estate. It is only on that point.

The COURT: Objection overruled.

To which ruling of the Court counsel for plaintiff then and there duly excepted.

Mr. WALKER:

Q. What building is there on that Van Buren property where this saloon was and what is its height?

A. Seven story brick building?

Q. Modern construction?

A. Yes.

Q. When was it put in?

A. About five years ago.

Q. And at that time, the four Elevated roads were operating in Van Buren street.

A. Yes.

Q. What is the width of Van Buren street, well, it is sixty six feet, isn't it?

A. Sixty six or sixty eight feet or something like that.

Q. Sixty six feet from lot line to lot line?

A. From lot line to lot line, yes.

Q. Now this building on the present property is an old, out of date construction is it not?

A. Yes.

Q. And it is not either in the class or in the kind of the new modern constructed buildings on Wabash avenue that have been built since the loop has been in operation.

A. No.

117 Q. When did it first have a passenger elevator in it?

A. It was put in there, I think, it was during the year 1907, when we remodeled the building.

Q. That is, that was one of the places—one of the things that was done when the building was remodeled that you talk about.
A. Yes.
Q. Now who were in and occupied that?
A. The Peck Bros.
Q. What was their business?
A. Wholesale plumbing supplies.
Q. And they occupied the whole building?
A. Yes.
Q. The whole property?
A. Yes.
Q. When did they go into possession?
A. Of that property?
Q. Weren't they there in 1892?
A. Yes, I think they were 1891 or 1892.
Q. Didn't they have a five year lease which expired by its own terms on the first of May 1897?
A. No, I think it expired in 1896 if I am not mistaken.
Q. Well, weren't they there up until the first day of May 1897?
A. No.
Q. Have you got——
A. I got my memorandum.
Q. What is that, something made by yourself?
A. Yes sir.
Q. Out of what?
A. Different data I have taken out of the books we have.
Q. Well, have you got the book here?
A. I have got part——
Q. Have you got the book that comes down to May 1907?
A. Yes.
Q. What is the last month that Peck Bros. paid rent?
A. I think it was in the fall of 1896.
Q. You say the fall of 1896. Now didn't they move out—was it the fall of 1897 or 1896?
A. No, I think it was 1896.

118 Mr. MECARTNEY: You interrupt the witness and we are losing time. Mr. Knight, let the witness answer.
Mr. WALKER: Mr. Knight was speaking to me.
Mr. MECARTNEY: Loud and it disconcerts the witness.
Mr. KNIGHT: We know the facts better than the witness does.
Mr. MECARTNEY: Maybe you had better testify.

Mr. WALKER:

Q. Now, Mr. Brand, have you any way that you can find out with accuracy the last month that the Pecks paid rent?
A. Yes.
Q. Can you turn to your book now and give me—have you your book the last month that they paid rent to show there?
A. If you will give me time, I will hunt for it.
Q. You mean——
A. It may take a little time.

Mr. WALKER: You see, your Honor, we did ask for the leases. My understanding is that the Peck lease expired in May 1897 and they had a continuous lease and that is what I am trying to show. He has not got the lease here.

A. We have not kept those old leases.

Mr. WALKER: It is my understanding. Mr. Witness—see if I can't recall your recollection any by cross-examination that their lease ran out the first of May, 1897, but that they moved out before the expiration of the lease and paid rent up until the expiration of it?

A. Yes.

Q. Well, isn't that right?

A. Yes, that is right.

Q. Yes; now their lease, that ran, did it not—see if I am not right. Their lease ran then to the first of May, 1897, and they paid rent up until that time but they moved out of the building what time, how long before the expiration of their lease?

119 A. I think that it was out in the Fall.

Q. Of 1896?

A. Of 1896.

Q. Now, how long did that lease run with the Pecks—since you haven't got it here, that expired on the first of May, 1897?

A. I don't know.

Q. Wasn't that a five year lease with a $6,000.00 a year rental for the first year or so and then $7,500.00 for the rest of the term?

A. The first year, the first lease the Pecks had in there——

Q. Was $6,000.00?

A. —was $6,000.00, $500.00 a month. That was a five year——

Q. What?

A. That was a five year lease.

Q. Yes.

A. Expired in 1895—1894, or 1895, I think it was.

Q. And then they leased——

A. For three years, if I am not mistaken, that was a three year lease.

Q. —for $7,500.00?

A. And then there was a compromise in between Mr. Brand and the manager of the Pecks for part of the time.

Q. It ran until 1898, their lease and there was a compromise by which they were permitted to leave that property and pay rent up until the first of May, 1897?

A. Some kind of compromise, I don't recollect.

Q. You know don't you that they moved out because that building was not modern, had no elevator and had no facilities for their business?

A. No.

Q. Why did they move?

A. Because they got cheaper rent.

Q. Where did they move to?

A. I think they moved across the street.

120 Q. On Wabash avenue?

A. Yes, further south.

Q. In a large building?
A. The building itself was large. I don't know how much——
Q. With an elevator?
A. I think there was an elevator in there.
Q. What was the number?
A. I don't recollect the number. About 300 I guess.
Q. Facing the elevated structure?
A. Yes.
Q. Was it North of Van Buren or South of Van Buren that they moved?
A. It was South of Van Buren.
Q. The structure between Harrison and Van Buren where the South side comes in and connects with the main loop?
A. Yes.
Q. Now, when in reference to the time that they moved out did you begin or did Mr. Brand begin to make some improvements, putting in this elevator and other improvements in that building.
A. Well, that was quite a time after.
Q. Quite a time after?
A. Yes.
Q. That is, he did not do very much trying to rent the building when the Peck Brothers were paying the rent every month up to the first of May, 1897?
A. We tried to rent under present conditions, found out we could not and had to spend money——
Q. Had to remodel it.
A. Yes.
Q. The people would not take the building as it stood?
A. Yes, but we could not get the rent for it.
Q. Because it did not have an elevator, did it?
A. It had an elevator.
Q. That was a passenger elevator in the rear?
A. Freight elevator.
Q. A freight elevator. Were your stairways outside of the one that goes up on the first floor changed in any way?
A. After the putting in of the present elevator?
121 Q. Yes, or did you leave the stairs where they were?
A. We left the stairs where they are now, with the exception there was three or four steps cut off and a turn made in front of the elevator.
Q. Yes and permitted the elevator to be built, that little narrow elevator in that hall?
A. Yes.
Q. There was a stairway running from the first floor as you came on up to the second?
A. Yes.
Q. Then you have to go towards the rear of the building to get a stairway, don't you, to come down or up.
A. Well, they met. They both started at the extreme end of the building. There was one on the ground floor and goes up and meets at the top, on the top floor.

Q. There was no change made in those?
A. No, not except on the ground floor.
Q. For this elevator?
A. Yes sir.
Q. Did you begin your remodelling before the first of May, 1897, or afterwards?
A. Before.
Q. And when in 1898 did you have your remodelling—when in 1898, you say it was between 1897 and 1898, did you finish or have the remodelling finished?
A. I think it was the Fall of 1897 that we had the building practically completed.
Q. Of course the renting season on Wabash avenue is the first of May?
A. Now it is the first of May, yes. At that time it was the first of January as a rule.
Q. You think you were ready to have rented?
A. Yes.
Q. At the first of January 1898.
A. Yes.
Q. Well, have you got the contracts for the remodelling of that building with you?
A. No.
122 Q. Who had the contract, if any one?
A. There was Mr. Brand let it out to different parties.
Q. Have you got memorandum now that will tell us who they were?
A. I think I have got part of it. I am not positive.
Q. Do your books show?
A. Yes, the statements would show.
Q. See if you can tell us who the contractors were and find out the date when the thing was finally settled, if you can get or give us the last date there.

The COURT: We will take our recess until ten o'clock tomorrow.

Mr. WALKER:

Q. Will you look up your contracts and see what leases you have got, Mr. Witness?

—. ——.

Mr. MECARTNEY: I don't expect to call any other witness.
Mr. WALKER: You mean to say, with the documents, you expect to rest your case?
Mr. MECARTNEY: I do, with the view of the jury and this witness and some other documentary proof, certain facts, I mean to say, in regard to the roll.

Whereupon an adjournment was taken to 10 A. M. December 1, 1909.

10 A. M. December 1, 1909.

Court convened pursuant to adjournment.
Present: Mr. Mecartney, Mr. Knight, Mr. Walker.

CHRISTIAN FLORUP resumed the stand for further cross examination by Mr. Walker.

Q. Mr. Florup, have you discussed your evidence of yesterday with Mr. Mecartney or his associate?

A. No.

Q. Or any one connected with the plaintiffs, since you were on the stand?

A. No.

123 Q. Or read a transcription or any part of your evidence?

A. No.

Q. Are you in a position now to give me the exact date at which Peck Brothers, on the arrangement there of the lease ceased to pay rent?

A. Yes sir.

Q. What is the last date?

A. The 4th day of November, 1896.

Q. Now, is that the date at which they moved from the building?

A. No.

Q. They moved prior to that?

A. Yes.

Q. And you compromised and let the lease terminate by their paying rent up to that date and that is about the time you began your improvements, is it?

A. No the improvements were made afterwards.

Q. Were done a year later, 1897 or 1898?

A. Part of it, I think, was made in 1896, the latter part of 1896.

Q. On through 1897?

A. And even through 1898, as tenants moved in there, there was improvements made.

Q. Are there four floors above the store floor?

A. Yes.

Q. What improvements did you make in the upper story or upper floor where the sky-lights are?

A. Well, there was different improvements made at different times.

Q. I mean after these people went out and up until—well, when did you cease making improvements; when did you make the last?

A. We ain't through with the last one yet.

Q. You are still improving?

A. As tenants go in and out, yes.

Q. Still doing some with the whole building?

A. Yes.

124 Q. I mean after 1898, when you started the improvements, when you put in the elevator and those improvements when did you quit those, sometime in 1898?

A. I think we quit the actual improvements on the building in

1898, I am not positive, but just about that time because there was——

Q. Do you remember what improvements you put in the upper floor that time when you made those general improvements.

A. There was new floors put in; the walls were plastered and new doors and new hall-way partitions all the way through, general improvements.

Q. And what was the condition of the floor below that, the third floor above the store floor, was that a loft without plaster or was—or had that been plastered before?

A. I think—I don't think that was plastered, no.

Q. Were the stories below that plastered at that time.

A. Yes.

Q. The two upper floors were just rafters and wood-work girders?

A. Yes.

Q. And the side-walls?

A. Yes.

Q. And what other improvements besides plastering did you put in the floor next to the top, along about that time if you recollect—new doors and new floors in there too?

A. Yes.

Q. Now, was there any change made in the floor below that, the floor you re-rented or tried to re-rent.

Q. I think the store-front was changed some; yes, I know it was.

Q. Before Camp came in?

A. Before Camp came in, yes.

Q. What business were the Peck Brothers in?

A. Wholesale plumbing supplies.

125 Q. And do you recollect what—I suppose they used the first floor for their store-room and offices?

A. No, their offices were in the second floor.

Q. Second floor. What was the first floor used for?

A. Show rooms.

Q. Show rooms?

A. And shipping rooms, in the rear.

Q. Anything besides offices on the second floor of the Pecks?

A. There was also ware-rooms in the rear of the offices.

Q. What did they use the upper rooms for?

A. Ware rooms.

Q. Storing stock?

A. Yes.

Q. The floors below the two upper floors, were there any changes made in that excepting the store-front?

A. Yes, I think—you mean the second floor?

Q. Was there any changes in that?

A. I think that was plastered the rear part. The front part was plastered.

Q. Then you had plastered the rear of the second floor?

A. Yes.

Q. How about the third?

A. Well, that is what I answered before.

Q. All right; any other change made at that time?
A. I think they put the passenger elevator in at that time.
Q. Up to that time, there had been no passenger elevator in the building?
A. No.
Q. That is the one that is in the front hall?
A. Yes.
Q. Top part of the front hall?
A. Yes.
Q. Do you know what the dimensions of that elevator are?
A. Very small; about 4 x 5, I should judge, 4 x 6, something like that.
126 Q. Carry about four people, not over-weight.
A. Depends on the size of them.
Q. Would not probably carry four of my size?
A. No.
Q. When did Camp come in, was he the first tenant for the store after the Pecks?
A. Yes.
Q. And he occupied the first floor and basement?
A. Yes.
Q. Was that William Carpenter Camp—Billy Camp?
A. Yes, it was Billy Camp.
Q. He came in with the piano business or something like that?
A. Yes.
Q. What date did he come in; can you tell me that. Have you got a memorandum or book that would show the date?
A. The date he came in, I can't tell you, but I can tell you the first rent he paid was in December.
Q. I beg pardon?
A. The first rent that was paid from Camp was in December.
Q. What year?
A. Of 1896.
Q. And how long was he in the building.
A. He was in then I should judge about nine months and might be there longer.
Q. He failed in business?
A. Yes, he was in there and had the place closed up, and no rent paid.
Q. What was the last rent he paid?
A. We got that some years after, we had to sue for it in 1900.
Q. He was not much of a business man, Billy Camp?
A. I don't think so.
Q. Now who was his successor?
A. Why, he did not have any. You mean as tenants?
Q. As tenants.
A. Chase Brothers.
127 Q. When did they come in?
A. They came in, I think it was in the first part of 1898.
Q. 1898 and how long did they stay in the building?

A. They stayed there quite a number of years, five or seven years I guess, something like that.

Q. Did they have any difference in the rent as they went along?

A. The first three years were $50.00 a month less than Billy Camp paid.

Q. What was that, $350.00?

A. $300.00. Billy Camp paid $350.00.

Q. Well, that is while the repairs were going on—that is the repair on that building had not been finished?

A. They were practically; that is as far as the ground floor went.

Q. They paid $300.00 a month and had the basement also?

A. Yes.

Q. And first floor?

A. Yes.

Q. For three years?

A. The first lease, I think, was three years, yes.

Q. From what other rent?

A. The other rent was $350.00.

Q. Parties that took a five year lease?

A. Yes.

Q. What do you get for that store now?

Mr. MECARTNEY: I object to that as entirely immaterial, too far removed from the issues in this case. It is twelve years after the improvement was completed.

The COURT: In determining the extent, I think it is proper to take into consideration the effect up to the time of the trial.

Mr. MECARTNEY: Physical effect, your Honor?

The COURT: Yes, the physical effect up to the time of the trial.

128 Mr. MECARTNEY: I don't object to the physical effect up to the time of the trial, but there is a difference between physical effect and rental value.

The COURT: I think it is competent to show the rental value unless you show me some authority to the contrary.

Mr. MECARTNEY: It is so far removed from it, I thought this text was enough to show your Honor. Your Honor yesterday limited me in showing the general conditions of the street, only within the block, to this particular block at that time. It seems to me something in that block twelve years afterwards——

The COURT: Something in the block would be different but this property itself which is for examination, what its rental value was any time—any time before the trial and up to the trial, showing the history of the progress of the property, would be competent. The objection is overruled. He may answer.

To which ruling of the court, counsel for plaintiffs then and there duly excepted.

A. For the purpose, for the length of time——

The COURT: Just pay attention to the question.

Mr. WALKER:

Q. My question is what rent are you getting; what is the lease-rent for the ground floor where you are making repairs now?
A. Getting about between $7,000 and $7,500.00 on a ten year lease.
Q. For the first floor?
A. For the first floor and basement.
Q. I didn't ask you, but——

Mr. MECARTNEY: Just answer the question.
The COURT: If that is the question; if there is any qualification about that.
A. There is a rebate.

The COURT: All right.

129 A. There is a rebate in that rent of $2,000.00 practically for us to expend on the premises.
Q. You have got to spend $2,000.00 in repairs?
A. Yes.
Q. That you are now doing?
A. Which we are now doing, yes.
Q. And then you are to get $7,000.00 a year for the first floor and basement, for how long a time?
A. Between $7,000.00 and $7,500.00 for a ten year lease. We had to give a ten years lease.
Q. Is it a graduated lease?
A. It is a graduated lease.
Q. Running from $7,000.00 to $7,500.00.
A. Yes.

The COURT: A year——

Mr. WALKER:

Q. A year.
A. A year.
Q. How long does the $7,000.00 run?
A. I think it runs for two and a half years, if I am not mistaken.
Q. Then what is the next rent?
A. $7,250.00.
Q. What is the next rent?
A. $7,500.00.
Q. How long does the $7,250.00 run?
A. I think it is two and a half years.
Q. What rent are you getting for the floor above the store.
A. Getting $137.50 a month.

Mr. MECARTNEY: That is objected to. He answered before I had time to object. I object to that, same ruling and exception and move to strike out, overruled and exception?
The COURT: Yes.

Mr. WALKER:

Q. When was that lease made.

Mr. MECARTNEY: I object.
The COURT: First lease or second lease?
Mr. WALKER: The one on the second floor where they are paying $137. a month.

A. A year ago.

Mr. MECARTNEY: That is objected to.
The COURT: Same ruling.

130 To which ruling of the court, counsel for plaintiffs then and there duly excepted.

Mr. WALKER:

Q. What rent are you getting for the next floor?

Mr. MECARTNEY: Same objection.
The COURT: Same ruling. He may answer.

To which ruling of the court, counsel for plaintiffs then and there duly excepted.

A. Same rental, $137.50.
Q. When did that rent begin?
A. Same year, about a year ago.
Q. Is it the same concern?
A. Yes.
Q. What rent do you get for the next floor?
A. $100.
Q. Is that the top floor?
A. No, that is the fourth floor.
Q. That is the one without any light?

Mr. MECARTNEY: Same objection.
The COURT: Same ruling.

Mr. WALKER:

Q. When did that lease begin to run?
A. That begins the first day of January. That is also a graduated lease.
Q. Does it get less or more?
A. Gets more. Goes up to $125.00 a month.
Q. How long does that run?
A. For three years, I think.
Q. How long is it at $100.00 a month.

Mr. MECARTNEY: One minute. I don't desire to keep repeating my objection. I take it your Honor, my objections are saved to this line of testimony?
The COURT: That is all right.

Mr. WALKER:

Q. When was that lease made, that $100.00 and up to $125.00.
A. $100.00 I believe it is for that up to the first of May, 1910, and then $125.00 after.
Q. When did it begin?
A. About a month ago.
Q. They come out of season, a month ago.
A. Yes.
131 Q. They pay $100.00 to the first of May and then $125.00 for the rest of the term?
A. Yes.
Q. Of course, if you rented it on the first of May, it would have been $125.00 all the way through?
A. Yes.
Q. What are you getting for the upper floor?
A. $125.

Mr. MECARTNEY: Same objection.
The COURT: Same ruling.
To which ruling of the court, counsel for plaintiffs then and there duly excepted.

Q. $125.00?
A. Yes.
Q. When did that lease begin?
A. That is a short lease expiring next May, about nine months.
Q. Do you mean it has only been in existence nine months.
A. Only been in existence about four months.
Q. What is that property worth a front foot on Wabash avenue now?

Mr. MECARTNEY: Objected to as immaterial, incompetent, too far removed from the issues in the case.
The COURT: Let us hear the answer.
To which ruling of the court, counsel for plaintiffs then and there duly excepted.
The COURT: What is it worth?
Mr. WALKER: In your opinion?

A. Depends upon what you can get for it.
Q. What in your opinion is the fair, cash market value of that property 25 x 171, as real estate, without the building.
A. About $6,000 or $6,500.00—small lot.
The COURT: Altogether, for the whole premises, or so much a foot?
A. So much a foot.

132 Mr. WALKER:

Q. Which corner do you consider the most valuable on Wabash Avenue south of Madison?

Mr. MECARTNEY: Objected to for the same reason, not competent at this time or at any other time.
The COURT: I think that is too far removed.

Mr. WALKER: Can I state the purpose of it to show its admissibility?

The COURT: Yes.

Mr. WALKER: I anticipate the witness will answer Jackson, the one lot to which this piece would be available, if a building was constructed. He may possibly answer Adams. Then I wish to show the value of the corner and the difference between the corner and inside, because my understanding of the property differs from the witness. I want to convince him he is about $1,000.00 too low on this value, by cross-examination.

The COURT: I think to go into the values of property in the neighborhood would be incompetent.

To which ruling of the court, counsel for defendant then and there duly excepted.

Mr. WALKER: Has there been a sale or 99 year or long term lease in that neighborhood within the last two or three years that you use at all as a basis for $6,000 or $6,500.00 on that front foot value?

Mr. MECARTNEY: I object.

Mr. WALKER: That is simply asking him what he bases it on.

The COURT: He may answer.

To which ruling counsel for plaintiffs duly excepted.

A. Not exactly. I take it from viewing it, and what brokers and owners offered us for our property for sale.

Q. You base it on that?

A. Yes.

Q. Have you a computation readily at hand that you can give me the total lease values on your figures, the lowest beginning
133 at $7,000.00, lowest total for the year to date, adding up here and then the largest beginning at $7,500.00?

A. No, I have not. You mean the leases?

Q. You have given me the figures; have you the totals?

A. No.

Q. Say the lowest total and the highest total when the rent changed to $7,500.00; you can't do that except you add it up yourself?

A. No, excepting I add it up.

Mr. WALKER: We can make the addition.

Q. Was it Mr. Aldis that made that offer to you?

A. No.

Q. When the offers were made, did you submit the rents to the person that made it or was it independent.

A. No.

Mr. MECARTNEY: I object to that. He has got his answers, he based it from time to time——

Mr. WALKER:

Q. Have you made a computation on the lower figure here, which is $13,500.00 a year rent and the higher figure $13,800.00. Would

you dare to say that that was correct or couldn't you without adding it yourself?

A. Without adding those, I could not.

Q. How frequently during those first two years of this constructed railroad were you on this property in question?

A. Off and on, almost every day.

Q. The Metropolitan Elevated never ran any steam cars around that road, did they?

A. I don't think they did.

Q. The Northwestern Elevated never operated any?

A. No.

Q. Always by electricity?

A. Yes.

Q. Can you give me any idea of how long the Oak Park ran engines on Wabash avenue after the road was constructed did they ever run any, the Lake Street?

A. Yes.

134 Q. On Wabash?

A. Yes.

Q. After the Loop was completed, I mean now say South of Adams street.

A. I don't recollect if they ran on the Loop. You mean the Lake street elevated?

Q. Yes.

A. No, I don't recollect.

Q. Don't you recollect that the South side was the only one, don't you now recall it, that went around the Loop with a steam engine; if the Lake street ran at all, it ran only to Adams and Wabash; when they started around the Loop the Alley L had not yet had time to build its equipment. Don't you remember that was the only one, when the Loop was separated South of Adams street, the South side was the only one, don't you now recall it, when they went around the Loop with steam engines. If the Lake street ran at all, it ran no farther than Adams and Wabash. Don't you think I am right about it?

A. I think you are something to that effect, I don't remember exactly.

Q. How long did the South Side Elevated run by engines?

A. Only for a short time; around the Loop?

Q. Yes.

A. Only a short time.

Q. Before that, they did not come on Wabash avenue at all; it stopped at Congress street?

A. Yes.

Q. When you say a short time, you mean a month or so?

A. Less than a year.

Q. You never made any measure of the distance from the lot line to the girders of the railroad did you?

A. No, I never stepped it off.

135 Q. That was your judgment?

A. Yes.

MAP

TOO

LARGE

FOR

FILMING

Q. You never paced it or measured it?
A. No.

Mr. WALKER:

Q. Are you going to offer that blue print.

Mr. MECARTNEY: Yes.
Mr. WALKER: Mr. Mecartney has a blue-print that he wishes to offer as part of his direct evidence and as long as he is going to offer it, might as well be done now.
Mr. MECARTNEY: I offer this blue print as plaintiff's exhibit "3".
Mr. WALKER: No objection to it.
Received so marked and is as follows.

(Here follows diagram marked page 136.)

137 Mr. WALKER:

Q. This plan offered in evidence shows the distance from the lot line in the curb line is 19 feet and 21 hundredths to the curb and between the curb and girders of the railroad 17 feet and fifty-one hundredths.

Mr. ADAMS: That is the face of the column.

Mr. WALKER:

Q. Mr. Witness, there is no column on this railroad or support in front of the Brand property, is there.

A. No, I don't think there is.

Mr. WALKER: I suppose these dotted lines, short dots here represent the columns of the structure and show where they are located. It is 17.51 feet from the Brand property to the center line of the column extended to that point. These dotted lines are the columns. This is the Brand property (indicating). Thes are the uprights and it is the line extended over from the center of the upright or column to the Brand property is 17.51 feet away and between the center line of the column and the girders, which is the nearest part of the structure at the Brand property is 3½ feet. That would make it over thirty feet from the building.

Mr. WALKER:

Q. The street car tracks on Wabash avenue, there are surface lines, two tracks?

A. Yes.

Q. That run beneath the structure?

A. Yes sir.

Q. With the exception as the street itself is interfered with by the columns, there is no other obstruction in the highway itself, is there?

A. Outside of the Elevated, no.

Q. There is no other obstruction in connection with the Elevated in the street, excepting the columns?

A. Not in front of our property.

138 Q. At any place?

A. Yes. Of the street, no.

Q. That is what I mean, in the surface of the street?

A. No.

Q. Do you know what the distance is or have you any idea of the distance between columns. I suppose they will appear on the plan?

A. Yes.

Q. But do you know what are the dimensions of the columns?

A. I answered that question yesterday.

Q. Well, what was your figure about their width?

A. Between a foot and eighteen inches, I should judge.

Q. And there is one of those columns on each side of the street, each side of the structure?

A. Yes.

Q. Now, with that exception, the sixty feet between the columns is

not at all interfered with with traffic on the street, is it, on the surface of the street?

A. No.

Q. And there are none of those columns in front of the Brand property?

A. No.

Q. The teams as well as cars use the track use the tracks on either side, don't they, just as they use railroad tracks on any other street surface railroad tracks, don't they?

A. Well, more or less, inside of the Loop they are not supposed to use it, but they use, just the same.

Q. Where is it proclaimed by ordinance or anything else that they are not supposed to use it?

A. Well, they are not directed by ordinance, I presume; but they are kept off the track as much as possible.

Q. What keeps them off?

A. The mounted officers, police officers.

Q. You mean that the conveyances that drive along Wabash avenue are kept off the railroad track?

A. As much as possible.

139 Q. If a car is coming filled with passengers and there is a conveyance in front of it?

A. Yes.

Q. Travelling along very slow, the police require the conveyance to turn out?

A. Yes.

Q. And they do that on any other street, don't they?

A. Yes.

Q. Did you have anything to do yourself with the inventory of this estate?

A. Yes.

Q. What did you have to do with it?

Mr. MECARTNEY: Objected to as immaterial, the inventory of this estate as entirely too immaterial. So long as we have the right to bring this action and maintain it, it is objected to as irrelevant and incompetent and immaterial.

Mr. WALKER: There is something in this inventory, when I come to show it, that impeaches his evidence. Wait until I get to that point. I asked him if he had anything to do with it and then I will ask him what it was.

The COURT: I don't see how it would be material now.

Mr. WALKER: How would it be material,—what portion of his testimony now? I suppose your point is that this was not inventoried as one of the claims?

Mr. WALKER: No.

The COURT: What part of his testimony is it competent.

Mr. WALKER: I wish to show this witness gave a value in this inventory to the Probate Court.

The COURT: Gave his value of the inventory.

Mr. WALKER: Of this property.

Mr. KNIGHT: It don't make any difference.

Mr. WALKER: All right, pass it up. I had something else that I wanted to ask this witness, but it has left me for the moment.

The COURT: Any re-direct, Mr. Mecartney?

140 Redirect examination.

By Mr. MECARTNEY:

Q. Mr. Florup, you have stated in answer to the Counselor's question certain rentals of that property at this time. You have given a rental of $7,000.00 for the first floor room; that included the basement too?

A. Yes.

Q. What condition is included in that lease for $7,000 a year?

A. That we expend—well, the conditions of the lease is that we expend a certain sum of money.

Q. The amount of it?

A. We are to do different work in there, put in new floors and stacks.

Q. Costing how much?

A. It was not specified, the amount of it, runs up to in the neighborhood of $2,000.

Q. The second floor, the immediate rental is how much for this time. I don't mean for the future, graded rental, but at this time, on the second floor?

A. $137.50.

Q. Now?

A. Yes, a month.

Q. And the third?

A. The same.

Q. And the fourth?

A. $100.00.

Q. And the fifth?

A. $125.00.

Q. When was the first of those leases that you have mentioned made, how lately?

A. A year ago.

Q. Nearest in the point of time?

A. About a year ago.

Q. Now, you take five years after this lease went into effect, counsel has opened up this line of testimony and under protest, without waiving my rights, I want to ask on redirect examination, about various periods during this time which he has covered.

141 The COURT: All right.

Mr. MECARTNEY: And I want to know that, without prejudice, of course I object to their bringing in any further evidence in respect to it, without waiving my rights in this respect. Take five years after the lease——

Mr. WALKER: We are not consenting to waive any rule of law that we are entitled to.

The COURT: Go ahead.

Mr. MECARTNEY: Well, take three years after this road was completed and in operation, can you give the rentals at that time?

A. Yes.

Q. Well, now, if you have your book there so you can give them in detail?

A. I know them.

Q. You know them. All right, now state what they were?

A. I can give them to you.

Mr. MECARTNEY: All right.

Mr. WALKER: Please give the years as we go along.

Mr. MECARTNEY:

Q. The monthly rental just three years—or within, say two and a half years—within three years. Don't go beyond the three years?

A. The ground floor was $300.00 a month for store and basement and the upper floors were $100.00 apiece. $400.00 for the upper floors and $300.00 for the ground floor, making a total of $700.00.

Mr. WALKER: That is as he testified on direct and we figured it out and it was $8,400.00 a year. It is in the record.

The WITNESS: Not two and a half years after the road was completed.

142 Mr. MECARTNEY: You did not. You mean to say you did not testify as to two and a half years after the road was completed?

A. No.

Q. You are now testifying to the figures you got two and a half years after the road was completed?

A. The first——

Mr. MECARTNEY: Mr. Florup, there has been a plan introduced in evidence here, showing the location of the Elevated road in front of these premises and within the block within which they are situated?

A. Yes.

Q. And this plat shows a road turning around on Van Buren street to the west, another road, *tow* tracks, turning on Van Buren street to the South, the double track road running South on Wabash avenue connecting with these two turns. Can you state what the physical situation is with reference to that connection, the connections of these roads and the way they turn in, whether it is closed in or not?

A. No sir.

Q. Underneath the structure, underneath the superstructure?

A. It is partly closed. I am almost positive part of it is closed and others is open.

Q. Between the tracks, right in under the tracks and within the turns and the limits of these tracks?

A. I could not tell you.

Q. Don't you remember about that?

A. There is a switch-tower track. I don't know if there is pans underneath there or not.

Mr. MECARTNEY: There is one question that I forgot to ask him on a direct examination and bring out——

Mr. WALKER: Go ahead.

Mr. MECARTNEY:

Q. Is there any physical effect in the way of noise or otherwise from these trains passing from these tracks to the other and around the curve?

A. Yes.

143 Q. Any especial effect that is not present in the front of the premises?

A. Nothing but the noise.

Mr. WALKER: I object to that.

The COURT: Noise is not an element; the Supreme Court has especially said that it was not.

Mr. MECARTNEY: Well, I beg to differ with your Honor very grievously on that. The effect of a railroad structure, for instance, any railroad structure that was running in front of a man's house, the physical effect that that has upon the enjoyment of the property is the whole subject and its effect upon the market value and whistling engines and the noise.

The COURT: The Supreme Court said in the case of Trustee vs. The Illinois Central Road especially decided that noise was not an element of damage.

Mr. MECARTNEY: Well, your Honor, there is a lot of decisions that have been both overruled and departed from. I am not ready to cite any special opinion against what they passed up yesterday but I do know this, and I believe, I know it; at least I mean to say this, if our position that the actual structure, having in view the uses to which it is to be put and the manner of operation whatever effect that has upon the enjoyment of the property is all bound up in one thing and you can't separate the elements in any way, shape or form. This is an action practically under the Eminent Domain Act.

The COURT: The question is one now in reference to noise.

Mr. WALKER: I made my objection and the witness answered before your Honor ruled on noise.

144 The COURT: He may answer. That testimony is already in, over your objection, of course, and this may go in and I will hear you when it comes to the time when you desire fully to present your theory of the matter.

Mr. WALKER: The objection is still reserved.

Mr. MECARTNEY:

Q. What is the special effect of this passing of trains around the corner from one track to the other, as shown on this plat?

Mr. WALKER: That is objected to.

The COURT: He may answer. The objection will be overruled. He may answer.

To which ruling of the court, counsel for defendant then and there duly excepted.

A. You mean to this particular piece of property?

Mr. MECARTNEY:

Q. No, what is the physical effect?
A. Darkening of the street, dirt and noise.
Q. Is there any special effect from the corner there, as distinguished from the property in front, the structure in front of this property; is there any special effect that comes from the corner which is appreciable, noticed in front of this property?
A. Yes, the noise.

Mr. WALKER: I move to strike that out.
The COURT: Motion overruled.
To which ruling of the court, counsel for defendant then and there duly excepted.

Mr. MECARTNEY:

Q. Describe it; what especial effect is it; describe the noise?
A. When the train goes over, it seems where the rails are connected—I notice many a time, go over there almost every day, it seems the connection of the rails either doesn't meet or is worn out or the ties are worn because it goes bumpety-bump when it goes
145 over there. That is what makes the noise when the cars go by and throw the switch.
Q. I am asking you what special effect, what special noise; does that make a different noise from the trains passing in front of the premises?
A. Yes.
Q. Greater or less?
A. Makes a greater noise.
Q. Have you anything that you desire to correct, in your testimony yesterday that you were asked about on direct examination?
A. Why, I have in regard to Jackson Boulevard. I made a remark there that it was a Boulevard eight or nine years or nine or ten years. It is a whole lot longer I guess it is closer to fourteen.
Q. That Jackson boulevard was established as a Boulevard?
A. Yes. Then there was a question, Mr. Mecartney asked me about the condition of the market.
Mr. WALKER: Of what?
A. Of the market, in 1897 and 1898. Well, I was thinking that he meant the condition of the real estate market in limiting in 1897 and my answer to that, I believe, was it was ordinary market, or something to that effect but in 1898 there was a boom and rents, I remember, at the time was—where we did not have long leases, we were trying to get more rents, all right.

Mr. MECARTNEY: That is all.

Recross-examination.

By Mr. WALKER:

Q. The boom began along about the Fall of 1897, didn't it?
A. I think it did.
Q. Right about the time that the Elevated railroad was put in operation?
A. Yes.

Mr. WALKER: That is all.

146 Redirect examination.

By Mr. MECARTNEY:

Q. You are referring to the general market conditions of the City?
A. Of the City.
Q. Mr. Florup, during the period you mentioned, three years before the road went there, and three years after were there many sales on Wabash avenue, in that general neighborhood, many or few?
A. I think the property next to us was sold at that time.
Q. That don't answer my question. Were there many or few?
A. There was a few sales there to my recollection.
Q. You have mentioned the property next to you, when was that bought, if you know?
A. Just about Fair time, I think, right after the Fair, something like that 1893, or something like that.
Q. Are you familiar with that sale?
A. Oh, yes.
Q. What was that property, if you know, then sold for?

Mr. WALKER: Well, wait a minute. What property is he talking about?

Mr. MECARTNEY:

Q. Which property is it?
A. I am talking about the property adjoining ours on the South.
Mr. WALKER: Let us have the dimensions.

Mr. MECARTNEY:

Q. How big is it?
A. Same size, only it was one story less, I guess.
Q. One story less.

Mr. WALKER: The building was one story less?

A. Yes.

147 Mr. WALKER: But the lot is the same size?
A. Same size.

Mr. MECARTNEY:

Q. And the general character of the building, was it about the same as this?
A. Just about the same, yes.

Q. And the property of about the same value, would you say; were the properties about the same?
A. Practically the same value, yes.

Mr. WALKER: He hasn't given the date.
Q. Do you remember the date?
A. No, I do not.
Mr. WALKER: What year?
A. I think it was 1893, around 1893 there.
Q. Can you state the amount of the sale?
A. Yes, $4,000.
Q. The purchase I mean?
A. Yes, $4,000.00 a foot for the land and I think the building was put in at $15,000 or $16,000.00 something like that; very nominal amount.
Q. What property do they call that?
A. At that time, Greeme Stewart's father bought it, the old County Commissioner.
Q. At that time—between that time and 1898, do you recall any other sales at all in the block that you personally know of?
A. I think it was a piece sold across the street, if I am not mistaken, but I don't recollect the price. I think it was less than this.
Q. Was it less depth?
A. Yes, the lots on the other side are smaller.
Q. Yourself, though, you have not any direct knowledge of that transaction?
A. No.

Mr. MECARTNEY: Well, that is all.

148 Recross-examination.

By Mr. WALKER:

Q. He says he hasn't any direct knowledge.

Mr. MECARTNEY: That is the one across the street. I didn't ask him any more about it.
The COURT: The one across the street.
Q. Did you have anything to do with this transaction of Stewart's?
A. No.
Q. Were you present at any of the negotiations?
A. No.
Q. Does your information come from reading the Economist or looking at the records, or something like that?
A. The Economist.
Q. That gave the valuation that was in the deed?
A. I could not tell you. I don't remember.
Q. You don't remember?
A. No.
Q. Well, then you are repeating values that appeared in some newspaper?

A. No, it was talked about in our office at the time, I remember.
Q. With Stewart's?
A. What is that?
A. With Stewart?
A. No.
Q. Or with the purchaser?
A. I forget——
Q. With the purchaser?
A. I don't know who the gentlemen was that was up there.
Q. You don't know whether he had any more information about it than you did?
A. I was talking to Mr. Stewart at one time just after the purchase, up at his house on Dearborn avenue.
Q. Did he give you these figures?
A. He was telling me of——
149 Q. Did he give you the figures that you have given us, $4,000 for the land and $17,000 and something for the building?
A. I don't recollect exactly if he gave them to me that way.
Q. The total sum was $117,500.00 wasn't it?
A. Just about that, I should judge.
Q. Your conclusion is the $100,000.00 is what was paid for the ground, therefore you say $4,000.00 a foot, isn't that it?
A. Yes.
Q. And you put the $17,500 as the value of the building?
A. Yes.
Q. That is your own separation?
A. Yes.
Q. Don't you know and didn't you hear as a matter of fact that in the selling price the building was figured at $30,000.
A. No, I did not.
Q. You don't know anything about that?
A. Not that it was put in at $30,000.00, no.
Q. You don't know anything about the $17,500.00 either; that is your own idea of it, isn't it?
A. It was plainly understood on the street at the time, even between the brokers, I mean, real estate brokers.
Q. On the street?
A. Right between real estate men.
Q. That the whole sum being $117,500.00 the ground must have been $4,000.00 and the building $17,500.00.
A. $4,000.00——

Mr. WALKER: I guess that is all.

150 Redirect examination.

By Mr. MECARTNEY:

Mr. MECARTNEY: I forgot to ask him another question, whether you aided in the payment of taxes upon this land from time to time since you became connected with this lot?
A. I generally paid the taxes, yes, in a lump sum.

Q. From what year to what year?
A. I got the check from Mr. Brand and I would pay it and I could not say off hand.
Q. How early did you start looking after or aiding in the payment of taxes? Looking after the payment of taxes?
A. Early—right after Mr. Brand's death.
Q. Did you help him by the payment of taxes during his lifetime?
A. No, not materially.
Q. Did you ever have any chance to look up assessments from time to time in the payment of taxes?
A. Yes.
Q. While you were collecting rents for him?
A. Yes.

Re-recross-examination.

By Mr. WALKER:

Q. Mr. Witness, how much had that property increased on that street from 1893 to October, 1897?
A. From 1*783*?
Q. From 1893?
A. Yes.
Q. Until October, 1897; how much had it increased?
A. Well, that is a hard question to say.
Q. Had it increased any?
A. Had it increased any from 1893 to 1897?
Q. Yes.
A. No.
Q. Was there not any boom then?
A. No.
Q. It had not increased from 1893 to 1897?
A. Not materially.
Q. The panic was here then wasn't it?
A. Yes.
151 Q. And it advanced until the boom happened in the Fall of 1897, didn't it?
A. It didn't affect that property, Mr. Walker.
Q. But it has maintained its same value; it didn't go up and there weren't any sales on the street, was there, except this one in 1893?
A. I don't know.
Q. It maintained its value, didn't it? It was not increased in value between 1893 and 1897?
A. That I could not tell you.
Q. I thought you just did tell me.
A. It maintained its value as far as the real, actual value of the property goes. The rents were lower.
Q. All right, but the value was the same, in your opinion; for sale it was just the same, but the rents were lower.
A. It was a case of carrying the property.

Q. Carrying it?
A. As you could not sell it.
Q. Your property was worth just the same as the other; you say they are identical in value, your property and the piece next door?
A. At the present time they are practically the same value.
Q. Weren't they then?
A. No.
Q. I am leaving out the building now?
A. No, our property was worth more.
Q. In 1893?
A. Yes.
Q. Than the one next door to it?
A. Yes.
Q. How much more?
A. I could not tell you. I don't know.
Q. What is your idea?
A. We had a larger building; we had a better building.
Q. I asked you to eliminate the building; the real estate; was the real estate worth any more under your building than the one next, the next 25 feet to the south or were they the same?
A. I should take it for granted it was worth more.
152 Q. Why do you say it was worth more?
A. Because it was closer to Jackson boulevard.
Q. It was 25 feet nearer?
A. Yes sir.
Q. To Jackson boulevard.
A. Yes.
Q. How much does the proximity, would you say, if you have any opinion on the subject, can you give me any estimate at all in dollars and cents that the difference, that 25 feet nearer to Jackson boulevard makes in the value of your property then?
A. I have got no opinion on it.
Q. Was it because yours is available as part of the corner to be used with the corner and the other not?
A. No.
Q. Well, are there either of them available to be used with the corners?
A. No.
Q. Is it worth $100.00 a foot more?
A. I could not say any price.
Q. Can you give me any?

The COURT: Says he could not.

Mr. WALKER:

Q. What made you say if this was worth the same in 1897, $4,000.00 a foot that the value was maintained through the panic, on what do you base the $4,800 as value instead of $4,000 of your piece in October, 1897, without the building, the ground?
A. In 1897 we were commencing to remodel; the ground without the building, you mean?

Q. I am talking about,—you said on your direct examination?
A. Yes.
Q. That this ground was worth $4,800.00 and the building worth between $15,000.00 and $20,000.00?
A. Yes.
153 Q. I asked you what made your ground worth in 1897 *worth* $800.00 more than the piece next door?
A. That was the Swift Commission in 1896 that put that value up.
Q. They put $800.00 more on yours than the other?
A. No, it was sold for $800.00, the property next door was——
Q. Sold for $800.00 less?
A. Than the Swift Commission put on it, if I am not mistaken.
Q. Was it a forced sale, Mr. Stewart's wasn't a forced sale in price, was it?
A. He bought it.
Q. He was the purchaser?
A. Yes.
Q. Who was the seller?
A. I don't recollect.
Q. Bradfogel?
A. I think that was it.
Q. Wasn't anything compulsory in that sale that you know of?
A. I don't recollect if there was or not.

Mr. WALKER: That is all.
The COURT: Call another.
Mr. WALKER: Mr. Knight has a question that he put to me and I did not comprehend it. May I put it to the witness?
The COURT: Yes. Stand where you are. Put your question.

Mr. WALKER:

Q. On the face of your record, you said there was no change in value from 1897 to 1902 yesterday, to this real estate; was there?

Mr. MECARTNEY: Wait a minute. That was withdrawn because his answer covered too much ground, and I limited it to three years.
The COURT: He is asking him now.
Mr. WALKER: His answer was never stricken out and it is here now. Was there any change.

A. There might have been, as far as figures went but as far as actual value, I don't recollect.
154 Q. That there was any?
A. No.

Mr. WALKER: All right.
Mr. MECARTNEY: That is all. I would like to offer the ordinance passed October 14, 1895, accepted October 21, 1895, page 964 and the following page.
The COURT: Instead of reading it, if there is no objection you may state the scope of the ordinance.

Mr. MECARTNEY: Just at this time, I desire to refer to the second section of Section 3. We can use such portions of it as we desire.

Mr. WALKER: The whole ordinance goes in?

Mr. MECARTNEY: The whole ordinance goes in.

Mr. KNIGHT: It was accepted and bond filed as required in the ordinance and the road built under provision in Section 1 for the building of this structure in Wabash avenue.

Mr. MECARTNEY: And the second paragraph of section 3 provides that this road shall be subject to the joint use of the Northwestern Elevated Railroad Company; the Lake Street Elevated Railroad Company, the Metropolitan West Side Elevated Railroad Company and the South Side Rapid Transit Railroad Company and the Union Elevated Railroad Company upon such terms and agreements as may be agreed upon, etc. I have here a very long lease contract between these roads dated October 1st, 1897, which I do not care to offer, if counsel concedes that that was the date of the consummated contract between the parties in respect to the lease.

Mr. KNIGHT: That is all right.

155 Said ordinance is as follows:

"Union Elevated Railroad Company.

"An ordinance authorizing the Union Elevated Railroad Company to construct and maintain an elevated railroad in Wabash avenue from Lake street to Harrison street. (Passed October 14, 1895. Accepted October 21, 1895.)

"Par. 1. Grant—Route.—Be it ordained by the city council of the city of Chicago:

Par. 1. That permission and authority be and the same are hereby granted to the Union Elevated Railroad Company to construct and maintain for a period of fifty (50) years from and after the passage of this ordinance, an elevated railroad with such switches, curves, turnouts, connections, supports, columns, girders, telegraphs, telephones and signals, and such other devices as the company may deem necessary for operating its cars, or for the operation of the trains and cars of the respective railroads hereinafter named, or any of them, in, along and upon the route hereinafter named.

Commencing in Wabash avenue at the north line of Lake street, thence running in a southerly direction in and along Wabash avenue to the south line of Harrison street, in said City, with the right to connect the elevated structure and tracks hereby authorized and operate the same in connection with the elevated railroad structure and tracks now in progress of construction in said Lake street, and also with the right to connect with the structure and tracks of the Chicago and South Side Rapid Transit Railroad Company at any point north of the south line of Harrison street, between Wabash avenue and Fifth avenue.

Par. 2. Plans—Approval—Inspection.—Par. 2. The said railroad company shall prepare and submit the commissioner of pub-
156 lic works of the City of Chicago, plans and specifications of the standard sections of the said railroad structure proposed

to be used by said company, and the said commissioner shall forthwith examine the plans and specifications so submitted, and in case such plans and specifications conform to the requirements of this ordinance, then said commissioner shall approve the same, whereupon the said company may commence to build and erect said railroad, as hereby authorized, in accordance with said plans and specifications so approved, and which said construction shall be under, and subject to the inspection and supervision of the commissioner of public works, who shall see that the same is constructed in accordance with the said plans and specifications so approved. The maintenance and operation of said elevated railroad shall be subject to all lawful general ordinances of the City of Chicago now in force or hereafter to be passed applicable thereto.

Par. 3. Specifications—Joint Use—Use Limited—Motive Power—Fare.)

Par. 3. The permission and authority hereby granted to construct, maintain and operate an elevated railroad in and along Wabash avenue between said Lake street and Harrison street, as aforesaid, are upon the following conditions:

First. That two tracks only shall be constructed and operated in and along said route; and the construction of more than two tracks in the route hereby authorized shall work a forfeiture of all the rights and privileges conferred by this ordinance, and this ordinance shall thereupon become and be absolutely null and void.

157 Second. That the Elevated Railroad hereby authorized in said Wabash avenue, between the points aforesaid, shall be subject to the joint use of the Northwestern Elevated Railroad Company, the Lake Street Elevated Railroad Company, the Chicago and South Side Rapid Transit Railroad Company, and the Union Elevated Railroad Company, upon such terms and conditions as have been agreed upon under any and all contracts now existing between the said corporations last above named, or such contract or contracts as may hereafter be entered into between the said companies, or any of them, for the use and operation of the said railroad hereby authorized.

Third. That all freight trains and other rolling stock of surface steam railroads shall be absolutely excluded from said elevated railroad tracks; it being understood that it shall be used for moving passenger trains only, and for accommodating and handling passenger traffic and the mails exclusively, and that all trains shall be regularly and systematically used, as shall be necessary to accommodate the public, and the number of all such trains shall be increased as rapidly as the demands of the public shall render necessary and the increase of traffic shall warrant. If any portion of the elevated structure of said company authorized by this ordinance shall at any time be used by the freight or passenger trains, or by the rolling stock of any surface steam railroad company, then all the rights and privileges herein granted shall wholly cease and be null and void, and the city council of the city of Chicago may order all of that portion of said elevated structure to be summarily removed and torn down.

Fourth. That the entire design and plan of the said railroad shall be that of an elevated structure and all material sued for that part of said structure above the ground shall be of wrought iron
158 or steel, except that the post connections may be of cast iron, and except the rails, which shall be of steel, and except the ties of longitudinal stringers supporting rails and the safe guards, which shall be of the best quality and kind of selected timber, and except the track walks, which shall be of wood. The stairs and all parts of the structure, except the platforms doors and windows and outside sheeting, and except the interior of the stations, shall be of iron or masonry. All station platforms and all of the material used in the construction of the work shall be of the best quality for the purposes to which they are to be applied, and the work shall be executed in a workmanlike manner.

Fifth. That all columns and supports for the said elevated structure shall be located as near the outside rails of the now existing surface tracks in said street as is consistent with the safety of the operation of the latter, and such columns and supports shall no where be less than four (4) feet outside of the outside rails of said now existing surface car tracks, except as hereinafter stated.

Sixth. That the structure of such elevated railroad shall be made as light and presentable as is compatible with the traffic thereon, and the space between the cross ties of the tracks, and also the space between the tracks themselves, shall not be floored or otherwise closed, but shall be left open for the transmission of light, except at stations so far as necessary to provide for passenger platforms. Said structure shall be what is known as lattice work construction, the same as the East Lake street extension construction, from Market street to Wabash avenue. The elevated structure shall span all cross streets, and no c-lumns or other supports shall be set
159 in the intersection thereof.

Seventh. But the motive power to be used in the operation of said elevated railroad hereby authorized shall be electricity, or some other motive power equally as clean and noiseless; provided, however, that the said Chicago and South Side Rapid Transit Railroad Company shall have the right to use steam as a motive power for operating its cars and trains, for the period of three (3) years from and after the passage of this ordinance, and upon, and after expiration of said three (3) years, the said Chicago and South Side Rapid Transit Railroad Company shall use for its motive power electricity, or some other motive power equally clean and noiseless.

Eighth. That the said railroad hereby authorized to be constructed shall be constructed before January 1st, 1897, and unless the said railroad hereby authorized to be constructed shall have been constructed before the expiration of the period last aforesaid, then all the rights and privileges granted as to that portion of said railroad which shall not have been so constructed shall cease and be void, but the rights and privileges as to the portion of said railroad which shall have been constructed, shall remain in full force. The time during which any legal proceedings shall be pending whereby the said companies, or either of them, shall be prevented from or delayed in constructing said railroad, shall be excluded from the

time herein prescribed for its completion and shall be allowed in addition to the time prescribed for the completion thereof; provided, however, that such exclusion shall date only from the time when notice shall have been given to the corporation counsel of the city of Chicago of the institution of such legal proceedings.

160 Ninth. That except where the width of any cross street between the curbs thereof, is seventy (70) feet or more, every cross street shall be spanned by a single span.

Tenth. That transverse diameter of each such post or column placed in the roadway shall not exceed eighteen (18) inches at the base. And thence for at least ten (10) feet above the surface of the roadway. The transverse diameter of a column when placed on or within the line of the curb, shall not exceed twenty-six (26) inches at the base, and thence for at least ten (10) feet above the surface of the roadway.

Eleventh. That the transverse diameter of the columns above indicated does not include fenders, and adequate fenders shall be fitted around the base of each column placed in the roadway, to prevent the hubs of the wheels — passing vehicles from striking the columns.

Twelfth. The longitudinal distance between columns, when the rows of columns are in the roadway of a street or avenue, shall not be less than thirty-five (35) feet except on the curbs.

Thirteenth. That the longitudinal distance between columns on or within the curb shall be at least twenty-five (25) feet.

Fourteenth. That no part of the girders of the superstructure shall be less than fourteen (14) feet above the then established grades of the street.

161 Fifteenth. That the different parts of the structure and the connections shall be properly proportioned to resist all the momentum of the train, which can, by the application of the brakes, be imparted to the structure.

Sixteenth. That the most approved safety guards shall be provided to prevent the cars from leaving the structure in case of accident.

Seventeenth. That the two tracks hereby authorized shall be set over the center of the streets as nearly as practicable, except at the curbs, and that all of the material used in the construction of the work shall be of the best quality for the purpose to which it is to be applied, and the work shall be executed in the best style of the art and in a workmanlike manner.

Eighteenth. That the rate of fare on the railroad for which this ordinance is granted, together with the whole of the railroad now belonging to, or which hereafter may belong to, or to be controlled by said Union Elevated Railroad Company, for the purpose of making a continuous loop, shall be (5) cents and no more; and it is expressly provided that the one fare of five (5) cents only shall be charged for a continuous ride on the line of the Union Elevated Railroad, and any one of the lines of railroad which shall use the tracks of the said Union Elevated Railroad, it being understood that the railroad referred to in this ordinance is to be a part of the Union

Elevated Railroad, known as the "loop line" and that passengers may be carried over the line of any one railroad using the tracks of the Union Elevated Railroad and around said loop or vice versa, for one fare of five (5) cents; provided, however, that police and firemen in uniform shall be permitted to ride free of charge.

162 Par. 4. Stations—Stairs—Lighting and Heating. Par. 4. The Union ElevatedRailroad Company shall have permission and authority, and the same is hereby given and granted to it to construct and maintain in the route hereby authorized, all necessary or proper stations, platforms and depot stations, and to connect the same with Wabash avenue, by means of all necessary stairs, stairways, elevators, landing places and other constructions and appliances for ingress, egress and the accommodation of passengers; but such platforms, stations, stairs, stairways, elevators, landing places, etc., shall be so constructed and maintained as not to unnecessarily impair the usefulness of such avenue, or any portion thereof. Neat and commodious passenger stations of easy and convenient access shall be provided, and all such station buildings and appurtenances, and like all passenger cars—when the latter are in use—shall be comfortably heated during the winter months, or whenever necessary at any season, they shall be properly lighted with gas, electricity or otherwise, and thoroughly ventilated at all seasons. Platforms and lines of stairs leading to and from the same shall be securely protected by strong wrought or steel railings, not less than three and one-half (3½) Feet high. The permission and authority to locate, construct and maintain all such requisite platforms, landing and lines of stairs leading to and from the sidewalks of the street and avenue, and the said elevated stations, being herein expressly granted said company whenever and wherever such methods of reaching such stations may be found necessary. Nothing herein contained, however, shall prohibit the company from locating and maintaining its stations in buildings which it

163 may purchase, lease or erect on grounds purchased or acquired by condemnation or lease, wherein it may for the convenience and comfort of its patrons place its ticket offices, waiting rooms, sanitary accommodations, stairways, elevators and all requisite methods of ingress or egress, and the right to construct and maintain covered passage-ways or connections between the interior of all such station buildings and the exterior platforms, is hereby expressly granted to said company. All of said supporting columns, cross girders, longitudinal girders, platform connections and hand railings shall be painted, and sightly in appearance — shall be maintained at all times. The plans and specifications of such depots, platforms and stairs shall be submitted to and approved by the commissioner of public works before the work of construction thereof shall have commenced.

Par. 5. Location of Stations. Par. 5. Stations of said elevated railroad in and along the route hereby authorized may be located at or near Randolph street at or near Washington street; at or near Adams street; at or near Congress street, and at such other place

or places as may be agreed upon between the said railroad company and the mayor or commissioner of public works of said city.

Par. 6. Connection with Power House. Par. 6. Permission and authority are hereby given to the Union Elevated Railroad Company to connect its power house or power houses with the elevated structure hereby authorized, by means of underground conduits, or by means of wires attached to said elevated structure; the same to be done under the direction of the commissioner of public works;
164 provided, however, that nothing in this section shall be construed to permit or allow the said company to use any conduits or wires for any purpose other than the uses of the Union Elevated Railroad Company.

Par. 7. Restoration of Streets. Par. 7. The consent, permission and authority hereby given are upon the express agreement and condition that the said company shall do no permanent injury to the pavement, gutters, sidewalks, water pipes, sewer or gas pipes, telegraph or electric wires, cables or pipes, or sidewalk space occupied by adjacent owners, but said company shall restore the street pavement, gutters, sidewalks, water pipes, sewer or gas pipes, telegraph or electric wires, cables or pipes and sidewalk space occupied by adjacent owners, at its own expense, to a condition equally as good as before the building of said elevated railroad so far as consistent with the occupancy by said company of said streets, alleys and sidewalk spaces authorized by this ordinance, and if the said company shall fail or refuse to do so, the same may be done by the City of Chicago, and the said company shall be liable to the city for the cost thereof. When any excavation shall be made by said company in any street, alley or public place, paved with wooden blocks, the foundation boards or planks shall be removed without being cut, unless said cutting shall be specially permitted by the commissioner of public works of said city.

Par. 8. Use of Structure by City. Par. 8. The City of Chicago shall have the right to use the structure authorized by this ordinance for placing thereunder its police, fire alarm and telephone wires, and other wires and conduits for the use of the city without charge.

165 Par. 9. Indemnity Clause. Par. 9. The consent, permission and authority hereby given are upon the further express condition that the said company shall and will forever indemnify and save harmless the city of Chicago against and from any and all damages of every kind and character, including land and business damages; and any and all damages to property of every kind and character, and from any and all damages, judgments, decrees and costs and expenses of the same, which it may suffer or which may be recovered or obtained against said city for or by reason of the granting or resulting from the passage of this ordinance, or any matter or thing connected therewith, or with the exercise by said company of any of the privileges hereby granted, or from any act or acts of the said company under or by virtue of the provisions of this ordinance.

Par. 10. Injunction Suit—Rights of City. Par. 10. The City of

Chicago shall have the right to intervene in any suit or proceeding brought by any person or persons seeking to enjoin, restrain or in any manner interfere with the prosecution of said work of construction, and move for a dissolution of such injunction or restraining order in such suit, in case it shall deem such suit collusive or instituted for the purpose of delay.

Par. 11. Company to Light Street Crossings, etc. Par. 11. The said railroad company shall light with incandescent electric lights all street and alley crossings or intersections along the route of its railroad as authorized by section 1 of this ordinance. Each street intersection shall be lighted by ten thirty-two candle power
166 lamps, and *and* each alley crossing by five thirty-two candle power incandescent lamps, to be placed, maintained and operated subject to the approval of the commissioner of public works. Whenever a change of location of existing street lamps, owned or used by the city of Chicago, is rendered necessary by the construction of said railroad, the same railroad company shall pay the expense of transferring and relocating all such city lamps, subject to the approval of the commissioner of public works.

Par. 12. Bond. Par. 12. The consent, permission and authority hereby given are upon the express agreement and understanding that the Union Elevated Railroad Company, before exercising any of the rights hereby granted, shall execute to the City of Chicago a good and sufficient bond in the penal sum of one hundred thousand dollars ($100,000) conditions that it will observe, perform and carry out all of the provisions of this ordinance, and will forever indemnify and save harmless the city of Chicago against and from *and any* all damages, including land and business damages, judgments, decrees, costs and expenses, which it may suffer or which may be recovered or obtained against said city for or by reason of, or growing out of, or resulting from the passage of this ordinance, or any matter or thing connected therewith, or with the exercise by said company of the privileges or any of them herein granted, or from any *or* acts of the said company, under or by virtue of the provisions of this ordinance. Provided, however, that the giving of said bond, of the recovery of a judgment or judgments thereon by the City of Chicago shall not be construed as measuring or limiting
167 the liability of said company to said city under any provisions of this ordinance, except to the extent of such recovery or recoveries in each case. The bond required by this section shall be filed with the city clerk within sixty (60) days from the passage of this ordinance.

Par. 13. Compensation. Par. 13. On the first of May in each year said company shall pay to the City of Chicago an annual license fee of fifty dollars ($50.00) for each and every car belonging to said company, used in transporting passengers for hire, and at the time of said payment, said company shall file with the city collector an affidavit subscribed and sworn to by its treasurer, or other officer of said company, if required by the city collector, stating the number of cars so used by said company. Upon such payment being made, the City Clerk shall issue a license to said company for each of its

cars so used, which license shall be issued as other licenses are issued, and each license shall contain the number of car for which the same is paid, and which license shall be posted by said company in some conspicuous place inside of each car so licensed.

Par. 14. Rights Extended to Successors, etc. Par. 14. The permission and authority, rights and privileges, herein conferred respectively upon the Union Elevated Railroad Company, the Northwestern Elevated Railroad Company, the Lake Street Elevated Railroad Company, the Metropolitan West Side Elevated Railroad Company, and the Chicago & South Side Rapid Transit Railroad Company, are hereby extended to and conferred upon the respective successors and assigns of each and every of said railroad companies above mentioned.

168 Par. 15. When in Force. Par. 15. This ordinance shall take effect and be in force from and after its passage, provided, the said Union Elevated Railroad Company shall within sixty (60) days after the passage of this ordinance, file its acceptance thereof with the city clerk of the city of Chicago, and shall at the same time file with said city clerk the bond as hereinbefore required."

Whereupon plaintiffs rested their case.

Mr. KNIGHT: I have a motion I would like to make.

(Whereupon jury was excused to 2 P. M.)

Mr. WALKER: Would your Honor like to look at this testimony of the witnesses while we are going on with the argument?

The COURT: I might take it.

Mr. WALKER: I have marked with lead pencil on the margin a reference to anything that might be material (handing same to court).

Mr. KNIGHT: If the Court please, we make a motion for the Court to instruct the jury to find the defendants not guilty and ask to have the following instruction given: "The court instructs the jury to find the defendants not guilty."

Whereupon, after argument of counsel, an adjournment was taken to 2 P. M. of the same day.

At 2 P. M. of the same day, court convened pursuant to adjournment and after further argument the court rendered the following decision upon said motion:

169 BRAND
v.
UNION ELEVATED RAILROAD COMPANY.

December 1, 1909.

Opinion of the Court.

MARCUS KAVANAUGH, *Judge:*

The COURT: The question raised is a question of some difficulty. It is merely questions pertaining to this branch of the law. It seems to me you have not made out a case, Mr. Mecartney.

The right of action, in matters of this kind, depends of course entirely upon the constitutional provisions. The Constitutional provision originally was that private property should not be taken for public use without just compensation. Afterwards it was amended. It was provided that private property should not be taken or damaged for public use without just compensation. The first question which arose under this provision of the constitution, the one most natural, was what was meant by the term damages. The Supreme Court of this State and of the other states have held not for sentimental damages is that which is contemplated, but it must be physical interference with the rem—the thing itself, the property. It must be something which especially injures the property, the real estate, or as you may well put it, the right to real estate, the jus or the rem, the basis of the jus or the rem.

Now, then, the Municipality, as the agent of the state has the right to permit the imposition of burdens upon public high-
170 ways—of service upon public highways, in so far as they do not inflict an injury upon this right. If they do, then there is a trial of the subject, the injury which is occasioned by this public right. Upon the trial of the case it is incumbent upon the plaintiff to prove his damages as these damages are limited and defined by the Supreme court. It is competent for him to bring forth evidence upon which the jury might base a verdict. Ordinarily in cases of this class, I don't think without consent of the parties, it would be the proper thing for the court, against the objection of either party to admit the jury to inspect the premises, but it was agreed in this case and more than that, counsel for the defendant in his statement to the jury told the jury that they were to examine the structure, to examine the property in question and that they were at liberty to say from this examination what interference, if any, there was with the rights of the plaintiff. Counsel for the plaintiffs said the same thing in substance to the jury. So, by consent, I think it may be assumed as a matter of law it was consented to by both sides, that the jury might examine the premises and might say from examination of the premises what interference there was with the property in question. That of course makes academic the discussion we had here on the question of whether or not the jury would have the right upon examination of the property to say what interference was had with the premises in ques-

tion. So that it must be considered, for the sake of the
171 argument, for the sake of this present issue, the jury had the right to say upon examination of the premises what interference this structure has with the land in question.

The rule which would ordinarily obtain where they are consented to view the premises I think would be that laid down by Judge Freeman in the 100th Appellate, that such an examination would be simply to enable the jury to better understand the introduction of testimony, but the statements of counsel upon both sides make the case go farther than that in this trial; but now the jury have gone down there and examined the premises and they have examined the premises. Assume for the sake of the argument that they have found that this structure in some way interferes with the ingress or egress of the premises in question. Then what is the result? The only evidence before the jury of damages to the property is that in some way or other this structure interferes with the ingress or egress to the property and that there are noises and vibrations. It has been especially held that vibrations, the ordinary vibrations of the road, a steam railroad passing in proximity to property are not grounds for damages unless they inflict physical injury upon the property itself. It has especially settled that mere noises, while they may be disagreeable and may be detract from the value of the property are not sufficient——

Mr. MECARTNEY: May I interrupt your Honor to say I
172 have a case in the Supreme Court that overrules the Appellate Court on the subject of noises? I don't know that it would make any difference to your Honor.

The COURT: This is a Supreme Court case.

Mr. MECARTNEY: This is a Supreme court case too.

The COURT: This case is the case of School Trustees against The Illinois Central—so that the only evidence of interference here before the jury would be evidence which would be incompetent and improper to recover upon.

Now I agree fully with your contention, Mr. Mecartney, that the measure of damages is the difference in the value of the property in question with the structure and that without the structure. But how is that measured? What is the basis of measure of those damages. Why, it is the price before the construction and the price immediately afterwards. That is the readiest and most available test of determining whether or not there was damage. If there was testimony here that without the structure it would be worth so much and with the construction it would be worth so much less, that would be another question from that which is presented here. Your claim is not for depreciation of the value of the land by reason of the structure but because the structure has prevented its appreciation. It is not for deterioration of value but because the value has not advanced. Although the value has not advanced, it has not been proven by the evidence and there is no evidence tending to prove it did not advance by reason of the erection of this structure. Non constat that the structure was erected, there may have been many reasons that the value of the property did not ad-

vance and the only affirmative evidence in the case is that immediately before the erection of the structure, the price was so much and that for a period of some years afterwards, the price was
173 so much. There is no evidence of depreciation at all. There is no evidence of right of appreciation which depended upon the erection of the structure and therefore I think you have not made out a case.

Mr. MECARTNEY: I don't care to argue the matter except to say that in the elevated railroad cases one of the very elements upon which they based it was the property was kept from advancing.

The COURT: You have not proved that.

Mr. MECARTNEY: That is a question for the jury on the various elements.

The COURT: I think you have to——

Mr. MECARTNEY: I only say I have done my best to keep your Honor from the error of being mislead by Mr. Knight as you were on another occasion.

Judge KAVANAGH: You have got your record now.

Mr. MECARTNEY: The record is all right.

The COURT: It is not a long record.

Mr. WALKER: You want to fix the record now, I take it.

Mr. MECARTNEY: I don't believe I want to argue the motion for a new trial and under the practice, as I understand it, I do not have to file a written motion.

Mr. WALKER: You want the motion entered. The new term begins next Monday does it not?

Mr. MECARTNEY: I will enter the motion for a new trial.

The COURT: Let it stand a week, because I don't know when the next term of the Appellate Court is.

Mr. WALKER: We don't care whether he files a written motion for new trial or not in writing, if he makes his motion.

174 Mr. KNIGHT: I think he ought to file it but not right now. We want the motion for a new trial filed, but we don't care for the filing right now. He can file it at any time during the *time*.

The COURT: I don't think he has to have the motion filed for a new trial. I don't think he requires to have motion for a new trial filed in a case where the Court takes it from the jury; there is a question whether or not he needs a motion for a new trial.

Mr. MECARTNEY: I understand I don't need that, but I want to make the safest kind of a record and I would like the order to be "jury instructed for the defendant and the plaintiffs except."

And thereupon the court granted the said motion of defendants and gave the jury the following written instruction, to-wit:

"The court instructs the jury to find the defendants not guilty."

To which ruling of the court in granting said motion and giving said instruction to the jury counsel for plaintiffs then and there duly excepted.

And thereupon the jury rendered their verdict finding the defendants not guilty.

Whereupon the plaintiffs by their counsel then and there moved the court to set aside the verdict so rendered and to grant a new trial of this cause, and filed the following motion in that behalf and to that end, viz.

175 STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 225,611. Term No. 275.

Case.

ELLA A. BRAND, E. L. BRAND, JR., and E. BELLE BRAND (now Atwell), Executors under the Last Will and Testament of Edwin L. Brand, Deceased,

vs.

UNION ELEVATED RAILROAD COMPANY et al.

And now come the plaintiffs, by their attorney aforesaid, and move the Court to set aside the verdict rendered in this cause and to grant a new trial therein.

And for grounds of their said motion and as reasons therefor the plaintiff show to the court the following, to-wit:

1. The court erred in instructing the jury to find the defendants not guilty and in giving the following instruction:

"The court instructs the jury to find the defendants not guilty."

2. The court erred in ruling out and in refusing to admit proper evidence offered by the plaintiffs, that is to say, evidence as to the suburban service and travel conveniences on the Illinois Central Railroad immediately before the construction of the defendants' elevated structure in Wabash avenue, as described in the declaration; and further, in sustaining objection to the following question propounded by the plaintiffs to the witness Florup, to-wit:

"In order to make the record I will ask you approximately how frequently trains ran on the Illinois Central suburban service, both express and local, at that time."

176 3. The court erred in ruling out and in refusing to admit proper evidence offered by the plaintiffs; that is to say, evidence of the cost of the remodeling or alteration of the building in question in 1896, 1897 or 1898; and further, in sustaining objection to the following question propounded by plaintiffs to the witness Florup, to-wit:

"Q. What extent, in money, if you know, was the remodeling of the building, how much of a cost?"

4. The court erred in ruling out and in refusing to admit proper evidence offered by the plaintiffs; that is to say, evidence of the values of property on Michigan avenue in the block between Jackson and Van Buren streets, immediately or shortly before and the construction of the railroad structure in Wabash avenue, and im-

mediately or shortly after the same as well; and also in making similar rulings as to such values of property on State street between Jackson and Van Buren streets immediately or shortly before and immediately or shortly after the building of said structure; and also in sustaining objections to the following question propounded by plaintiffs to the witness Florup, to-wit:

Q. Were you familiar with the character and value and of rents generally in Michigan avenue opposite this block in question, the corresponding block on Michigan—at that time?"

Also in sustaining objection to the following question:

"Q. Now do you know—I think you have stated, but I will ask you again—the value of Michigan avenue property in the corresponding block east immediately before this structure in Wabash was commenced?"

Also in sustaining objection to the following question:

177 Q. Immediately east, corresponding block between Jackson boulevard and Van Buren street. I will ask you if you know the value of property on the State street block, the corresponding State street block between Jackson boulevard and Van Buren street and west of this property there, immediately before the commencement of the building of the structure in Wabash avenue, just answer yes or no."

And in sustaining objection to the following question:

"Q. Then I will make the question read this way: what was the value?"

5. The court erred in not submitting the case to the jury.

6. The court erred in not ruling defendants to produce evidence to meet plaintiff's evidence, or in default thereof submitting the cause to the jury.

7. The court's decision and ruling in giving such peremptory instruction to the jury to find the defendants not guilty were—

(*a*) In conflict with and contrary to "Par. 2" of "Article II" of the Constitution of Illinois, providing that "no person shall be deprived of life, liberty or property without due process of law."

(*b*) In conflict with and contrary to the provision of "Par. 13" of "Article II" of the Constitution of Illinois, providing that "Private property shall not be taken or damaged for public use without just compensation."

(*c*) In conflict with and contrary to "Par. 14" of said "Article II" which provides that "No law impairing the obligation of contracts shall be passed;"

(*d*) In conflict with and contrary to "Par. 10" of "Article II" of the Constitution of the United States, providing that "No State shall pass any * * * law impairing the obligation of contracts;"

178 (*e*) In conflict with and contrary to "Par. 1" of the Fourteenth "XIV" Amendment to the Constitution of the United States, providing: "Nor shall any state deprive any person of life, liberty or property without due process of law;"

(*f*) In conflict with and contrary to the provision in said last quoted section which provides: "Nor shall any state * * * deny

to any person within its jurisdiction the equal protection of the laws."

8. The Court's decision and ruling in respect to the non-admission and exclusion of evidence in said cause shown hereinabove and specified in paragraphs No. 2, 3 and 4 hereof, and its decision and ruling in each of such instances, were in conflict with and contrary to each and all of the said provisions of the State and Federal Constitutions recited in the preceding paragraph hereof, No. 7.

9. The verdict is contrary to the law.

10. The verdict is contrary to the evidence.

11. The verdict is contrary to the law and the evidence.

Wherefore plaintiffs pray that a new trial may and shall be granted in this cause.

HARRY S. MECARTNEY,
Attorney for Plaintiffs.

179 But the court denied the said motion of plaintiffs to set aside said verdict and grant a new trial and gave judgment on the verdict against the plaintiffs; to which decisions of the court in denying said motion and in rendering such judgment the plaintiffs by their counsel then and there duly excepted.

Forasmuch therefore, as the above matters and things do not otherwise fully appear of record in this case, counsel for plaintiffs tenders this their bill of exceptions herein and prays that the same may be signed and sealed by the judge of said court before whom said case was tried and thereby made a part of the record in this cause, all according to the statute in such case made, which is accordingly done this 21 day of December A. D. 1909.

MARCUS KAVANAGH, *Judge.* [SEAL.]

Presented for seal and signature in open court this 11th day of Dec. 1909.

MARCUS KAVANAGH, *Judge.* [SEAL.]

And afterwards, to-wit, on the 24th day of December A. D. 1909 a certain Appeal Bond was filed in the office of the Clerk of said Court in words and figures following, to-wit:

180 *Appeal Bond—Supreme Court.*

Know all men by these presents, That we Ella A. Brand, E. L. Brand, Jr., and E. Belle Brand Atwell, as executors of the estate of Edwin L. Brand deceased and John Milton Oliver of the County of Cook and State of Illinois, are held and firmly bound unto The Union Elevated Railroad Company, The Lake Street Elevated Railroad Company, the South Side Elevated Railroad Company, The Northwestern Elevated Railroad Company and The Metropolitan West Side Elevated Railway also of the same county and state, in the penal sum of two hundred fifty ($250.00) dollars, lawful money of the United States, for the payment of which, well and truly to be

made, we bind ourselves, our heirs, executors and administrators, jointly severally and firmly by these presents.

Witness our hands and seals this 13th day of December A. D. 1909.

The condition of the above obligation is such, That Whereas, the said Railroad Company, obligees, above named, did, on the 11th day of December A. D. 1909, in the Superior Court of Cook County, in the State aforesaid, and of the December term thereof A. D. 1909, recover a judgment against the above bounden Ella A. Brand, E. L. Brand, Jr. and E. Belle Brand Atwell as such executors for costs of suit; from which said judgment of the said Superior Court of Cook county, the said obligors have prayed for and obtained an appeal to the Supreme Court of said State.

Now, Therefore, if the said obligors shall duly prosecute their said Appeal with effect and moreover pay the amount of the judg-
181 ment, costs, interest and damages rendered, and to be rendered, against them in case the said judgment shall be affirmed in said Supreme Court, then the above obligation to be void; otherwise to remain in full force and virtue.

ELLA A. BRAND, [SEAL.]
E. L. BRAND, JR., [SEAL.]
E. BELLE BRAND ATWELL, [SEAL.]
Executors of the Estate of Edwin L. Brand, Deceased;
JOHN MILTON OLIVER. [SEAL.]

E. A. B.
E. L. B., JR.
E. B. ATWELL.

Approved:

MARCUS KAVANAGH, *Judge.*

O. K.

ADAMS.

STATE OF ILLINOIS,
County of Cook, ss:

I, Charles W. Vail, Clerk of the Superior Court of Cook County, in and for the State of Illinois, and the keeper of the records, files, and seals thereof, do hereby certify the above and foregoing to be a true, perfect and complete Transcript of the Record in a certain cause lately pending in said Court on the law side thereof, wherein Ella A. Brand et al., etc. were Plaintiffs and the Union Elevated Railroad Company defendants.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Chicago, this 3rd day of January, A. D. 1910.

[SEAL.] CHARLES W. VAIL, *Clerk.*

182 In the Supreme Court of Illinois, to the February Term, A. D. 1910.

ELLA A. BRAND, E. L. BRAND, JR., and E. BELLE BRAND ATWELL, Executors under the Last Will and Testament of Edwin L. Brand, Deceased, Appellants,

vs.

UNION ELEVATED RAILROAD COMPANY, LAKE STREET ELEVATED Railroad Company, South Side Elevated Railroad Company, Northwestern Elevated Railroad Company, and Metropolitan West Side Elevated Railway Company, Appellees.

Appeal from Superior Court, Cook County.

Hon. Marcus Kavanagh, Trial Judge.

Assignment of Errors.

And now come the above named appellants, by Harry S. Mecartney, their attorney, and show to the Supreme Court of the State of Illinois that in the record and proceedings in the said and foregoing cause there is manifest error; and that the said Superior Court of Cook County erred therein to the injury of appellants and to the prejudice and against their rights in the following particulars, to-wit:

First. The said court erred in entering its judgment against appellants in manner, form and substance as aforesaid.

Second. The court erred in denying the motion for a new trial made by appellants, and for the reasons and upon the grounds shown in the written motion for a new trial and for each of said reasons and grounds.

183 Third. The court erred in instructing the jury to find the defendants not guilty.

Fourth. The court erred in ruling out evidence offered by appellants as to the suburban service and travel conveniences of the Illinois Central Railroad, and as specified in the "2nd" ground of said motion for new trial.

Fifth. The court erred in ruling out proper evidence offered by appellants as to the cost of the alteration of the building in question, as shown in the "3rd" ground of said motion for new trial.

Sixth. The court erred in ruling out evidence offered by appellants as to the values of property on Michigan avenue and State street near to and in the vicinity of the property in question, and as specified in the "4th" ground of the motion for new trial.

Seventh. The court erred in not submitting the said cause to the jury.

Eighth. The court erred in not ruling appellees to produce evidence to meet appellants' evidence, or in default thereof submitting the cause to the jury.

Ninth. The court's ruling and said judgment are in conflict with

and contrary to "Par. 2" "Par. 13" and "Par. 14" of "Article II" of the Constitution of Illinois and each of them as specifically claimed in the "7th" ground of said motion for new trial.

Tenth. The court's ruling and said judgment are in conflict with and contrary to "Par. 10" of "Article I" of the Constitution of the United States, providing that "No state shall pass any * * * law impairing the obligation of contracts."

184 Eleventh. The court's ruling and said judgment are in conflict with and contrary to "Par. 1." of the Fourteenth "XIV" Amendment to the Constitution of the United States, providing: "Nor shall any state deprive any person of life, liberty or property without due process of law.

Twelfth. The court's ruling and said judgment are in conflict with and contrary to the provision in said last quoted section which provides: "Nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws."

Thirteenth. The court's decision and ruling in respect to the non-admission and exclusion of evidence in said cause and specified in grounds "2", "3" and "4" of said written motion for new trial, and its decision and ruling in each of such instances, were in conflict with and contrary to each and all of the said provisions of the state and federal constitutions referred to and recited hereinabove.

Fourteenth. The said judgment is contrary to the law.

Fifteenth. The said judgment is contrary to the evidence.

Sixteenth. The said judgment is contrary to the law and evidence.

Wherefore, appellants pray that the judgment aforesaid of the Superior Court of Cook County may be reversed, set aside, annulled and held for naught, and that full justice be done them in the premises, etc.

HARRY S. MECARTNEY,
Counsel for Appellants.

185 In the Appellate Court, First District Illinois.

No. 16414.

ELLA A. BRAND et al., Executors of the Estate of Edwin L. Brand, Dec'd, Appellants,

VS.

THE UNION ELEVATED RAILROAD CO. et al., Appellees.

Appeal Cook Superior, Transferred from the Supreme Court of Illinois.

Error Cook.

I, Alfred R. Porter, Clerk of the Appellate Court, within and for the First District of Illinois, and keeper of the records, files and seal thereof, do hereby certify that the Transcript of Record hereto attached and marked "A" is the original transcript of record filed

in said Appellate Court, on the 21st day of February A. D. 1910 by said Appellants.

In testimony, whereof, I have hereunto set my hand and seal of said Court, at Chicago, Illinois, this eighth day of May A. D. 1912.

[SEAL.] ALFRED R. PORTER,
Clerk of the Appellate Court, First District, Illinois.

186 8367. 31.

Record from Appellate Court, First District, to Supreme Court.

Nisi Prius Gen. No. 225,611. Appellate Gen. No. 16414. Supreme Court Gen. No. —.

ELLA A. BRAND et al.
vs.
THE UNION ELEVATED RAILROAD CO. et al.

Filed May 25, 1912. J. McCan Davis, Clerk of Supreme Court.

187 At a Term of the Appellate Court Begun and Held at Chicago, on Tuesday, the Fifth Day of March, in the Year of Our Lord One Thousand Nine Hundred and Twelve, within and for the First District of the State of Illinois.

Present Hon. Edward O. Brown, Presiding Justice.
" " Ben M. Smith, Justice.
" " Frank Baker, Justice.
Alfred R. Porter, Clerk.
Michael Zimmer, Sheriff.

Court met pursuant to law.
Court opened by proclamation.

No. 16414.

ELLA A. BRAND, E. L. BRAND, and E. BELLE BRAND ATWELL, as Executors of the Estate of Edwin L. Brand, Deceased, Appellants,
vs.
THE UNION ELEVATED RAILROAD COMPANY, THE LAKE STREET Elevated Railroad Company, The South Side Elevated Railroad Company, The Northwestern Elevated Railroad Company, and The Metropolitan West Side Elevated Railroad Company.

Transferred from the Supreme Court of Illinois.

Appeal from Cook Superior.

Error to —.

Be it remembered, That on the fifth day of October A. D. 1909, it being one of the days of the October Term, A. D. 1909, certain

proceedings were had in said Court, and entered of record in the words and figures following, to-wit:

188 At a Term of the Appellate Court Begun and Held at Chicago on Tuesday, the Fifth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Nine, within and for the First District of the State of Illinios.

Present Hon. Jesse Holdom, Presiding Justice.
" " Henry V. Freeman, Justice.
" " Frank Baker, Justice.
Alfred R. Porter, Clerk.
Christopher Strassheim, Sheriff.

Court opened by proclamation.

And afterwards, on the 21st day of February A. D. 1910, a certain certified copy of an order of the Supreme Court of Illinois was filed in said cause, which said order is in the words and figures following, to-wit:

At a Supreme Court, Begun and Held at Springfield on Tuesday, the First Day of February, in the Year of Our Lord One Thousand Nine Hundred and Ten, within and for the State of Illinois.

Present:

William M. Farmer, Chief Justice.
James H. Cartwright, Justice.
Alonzo K. Vickers, Justice.
Frank K. Dunn, Justice.
John P. Hand, Justice.
Orrin N. Carter, Justice.
George A. Cooke, Justice.
William H. Stead, Attorney General.
Warren C. Murray, Bailiff.

Attest:
J. McCAN DAVIS, *Clerk*.

Be it remembered, to-wit, on the Third day of February, A. D. 1910, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court had and entered of record to-wit:

189 No. 7016.

ELLA A. BRAND, E. L. BRAND, JR., and E. BELLE BRAND ATWELL, Executors under the Last Will and Testament of Edwin L. Brand, Deceased, Appellants,

vs.

UNION ELEVATED RAILROAD COMPANY, LAKE STREET ELEVATED Railroad Company, South Side Elevated Railroad Co., and Metropolitan West Side Elevated Railroad Company.

Appeal Superior Court Cook.

And now on this day the Court having duly examined the motion of appellee to transfer this cause to the Appellate Court for the First District and having also diligently examined and inspected the record and proceedings aforesaid, and now being sufficiently advised of and concerning the premises are of the opinion that no constitutional question is involved herein and that the Appellate Court has jurisdiction of this appeal.

Therefore it is ordered by this Court that this cause be transferred to the Appellate Court of the First District of the State of Illinois.

And it is further considered by the Court that he said Appellees recover of and from the said appellants costs by them in this behalf expended to be taxed and collected in due course of law.

I, J. McCan Davis, Clerk of the Supreme Court of the State of Illinois do hereby certify the above and foregoing to be a true, perfect, and complete copy of an order of the said Supreme Court in the above entitled cause of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, this 18th day of February, A. D. 1910.

[SEAL.] J. McCAN DAVIS,
Clerk Supreme Court.

190 And afterwards on the 24th day of February, A. D. 1910, it being one of the days of the said October term, A. D. 1909, of said Court, the following proceedings were had and entered of record in said cause, to-wit:

No. 16414.

ELLA A. BRAND et al., Ex'rs, etc.,

vs.

THE UNION ELEVATED R. R. Co. et al.

Error to Cook.

Appeal from Cook Superior.

This cause having this day been reached in the call of the docket, and counsel desiring to argue the same, and the Court, not being

fully advised in the premises, doth order that said cause be taken under advisement, on briefs filed, appellee's briefs to be filed in 60 days and to be argued orally on a date in the future to be fixed by the court.

And afterwards, on the 13th day of October, A. D. 1910, it being one of the days of the October term, 1910, of said Court,, the following proceedings were had and entered of record in said cause, to-wit:

16414.

ELLA A. BRAND et al., Executors, etc., Appellants,
vs.
UNION ELEVATED RAILROAD COMPANY et al., Appellees.

Appeal Cook Superior.

This day came appellants, by their counsel, and moved the Court for leave to file reply briefs in said cause instanter, as per affidavit and stipulation filed herein; and the Court being fully advised in the premises, doth order that said motion be and the same is hereby allowed:

191 And afterwards, on the 1st day of December, A. D. 1910, the following proceedings were had and entered of record in said cause, to-wit:

16414.

ELLA A. BRAND et al., Executors, etc., Appellants,
vs.
UNION ELEVATED RAILROAD Co. et al., Appellees.

Appeal Cook Superior.

The Court having considered the motion of the appellants to advance said cause for hearing in this Court and being now fully advised in the premises, doth order that said motion be and the same is hereby denied.

And afterwards, on the 3rd day of October, A. D. 1911, it being one of the days of the October term, 1911, of said Court, the following proceedings were had and entered of record in said cause, to-wit:

16414.

ELLA A. BRAND et al., Executors, etc., Appellants,
vs.
THE UNION ELEVATED R. R. COMPANY et al., Appellees.

Appeal Cook Superior.

This day came James J. Barbour and moved the Court that he be substituted as attorney of record in said cause, in place of Clarence A. Knight, deceased, as per stipulation filed herein; and the Court being fully advised in the premises, doth order that said motion be and the same is hereby allowed.

And afterwards, on the 1st day of April, A. D. 1912, it being one of the days of the March Term, 1912, of said Court, the following proceedings were had and entered of record in said cause, to-wit:

192 16414.

ELLA A. BRAND, E. L. BRAND, JR., and E. BELLE BRAND ATWELL, as Executors of the Estate of Edwin L. Brand, Deceased, Appellants,

vs.

THE UNION ELEVATED RAILROAD COMPANY, THE LAKE STREET Elevated Railroad Company, The South Side Elevated Railroad Company, The Northwestern Elevated Railroad Company, and The Metropolitan West Side Elevated Railroad Company, Appellees.

Error to Cook.

Appeal from Cook Superior.

On this day come again the said parties, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for Error and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious, or defective; and that in the record there is no error: Therefore, it is considered by the Court that the judgment aforesaid, be Affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for Error.

And it is further considered by the Court that the said appellees recover of and from the said appellants their costs by them in this behalf expended, to be taxed, and paid in due course of administration.

And afterwards, on the 20th day of April A. D. 1912, the following proceedings were had and entered of record in said cause, to-wit:

193 16414.

ELLA A. BRAND, EDWIN L. BRAND, JR., and E. BELLE BRAND ATwell, Executors of the Estate of Edwin L. Brand, Deceased, Appellant,

vs.

THE UNION ELEVATED RAILROAD CO. et al., Appellees,

Appeal Cook Superior.

The Court having considered the petition of appellants praying for an appeal from the order and judgment of this Court in said cause to the Supreme Court of the State of Illinois, and the Court being now fully advised in the premises, are of the opinion and therefore certify that this cause involves questions of law of such importance on account of principal and collateral interests involved, as that it should be passed upon by the Supreme Court; It is therefore ordered that an appeal be allowed herein to the said Supreme Court on condition that appellants do within twenty days from this date execute and file in said cause a good and sufficient appeal bond, conditioned according to law in the penal sum of five hundred dollars, with surety thereto, to be approved by the Court.

EDWARD O. BROWN,
BEN M. SMITH,
Justices.

And afterwards, on the 6th day of May, A D. 1912, the following proceedings were had and entered of record in said cause, to-wit:

194 No. 16414.

ELLA A. BRAND et al., Executors, etc., Appellants,

v.

THE UNION ELEVATED RAILROAD CO. et al., Appellees.

Error to Cook.

Appeal from Cook Superior.

This day came appellants by their counsel, and presented their certain Appeal Bond in said cause in the penal sum of Five hundred dollars with John Milton Oliver as surety thereto; and the Court, being fully satisfied as to the qualifications of said surety, doth order that said Appeal Bond be and the same is hereby taken, approved and filed herein.

And afterward, on the same day, to-wit; the 6th day of May, A. D. 1912, an Appeal Bond was filed in said cause, which said bond is in the words and figures following, to-wit:

Know all men by these presents, That we, Ella A. Brand, Edwin L. Brand, Jr., and E. Belle Brand Atwell, Executors of the Estate of

Edwin L. Brand, deceased, as Principals, and hereinafter designated and referred to herein as the obligors, and John Milton Oliver as surety of the County of Cook and State of Illinois, are held and firmly bound unto The Union Elevated Railroad Company, The Lake Street Elevated Railroad Company, The South Side Elevated Railroad Company, The Northwestern Elevated Railroad Company and the Metropolitan West Side Elevated Railway Company, corporations, etc., hereinafter designated and referred to herein as the obligees, also of the same County and state in the penal sum of Five hundred and 00/100 dollars, lawful money of the United States for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

Witness our hands and seals this 22nd day of April, ——.

The condition of the above obligation is such, That whereas, the said obligees did on the 11th day of December, A. D. 1909, in the Superior Court of Cook county, in the State aforesaid, and of December Term thereof, A. D. 1909, recover a judgment 195 against the said obligors in cause General Number 225,611 of said Superior Court entitled Ella A. Brand, et al., Executors, vs. The Union Elevated Railroad Company et al., that the said plaintiffs and obligors take nothing by their said suit and that the said defendants and obligees go hence without day besides costs of suit; from which said judgment of the Superior Court of Cook County, the said obligors prayed for and obtained an appeal to the Appellate court within and for the First District of said State; and whereas the said Appellate Court did on the 1st day of April, A. D. 1912, and at the March term thereof, A. D. 1912, affirm the judgment of the Superior Court aforesaid and did render judgment against the above bounden obligors for costs of suit, from which order of affirmance and judgment of the said Appellate Court the said obligators *has* prayed for and obtained an appeal to the Supreme Court of the State of Illinois.

Now, therefore, if the said obligors shall duly prosecute their said Appeal, with effect, and moreover pay the amount of the judgment, costs, interests, and damages rendered, and to be rendered against them in case the said judgment shall be affirmed in said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virtue.

ELLA A. BRAND, [SEAL.]
EDWIN L. BRAND, [SEAL.]
E. BELLE BRAND ATWELL, [SEAL.]
Executors of the Estate of Edwin L. Brand, Deceased.
JOHN MILTON OLIVER. [SEAL.]

Approved May 6, 1912.
E. O. B., *P. J.*

Examined and surety and form satisfactory.
JAMES J. BARBOUR,
Att'y for Appellees.

196 I, Alfred R. Porter, Clerk of the Appellate Court, in and for the First District of the State of Illinois, and keeper of the records, files, and seal thereof, do hereby certify that the foregoing is a true copy of the final order and judgment and all other proceedings and appeal bond of the said Appellate Court in the above entitled cause of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Appellate Court, at Chicago, this eighth day of May in the year of our Lord one thousand nine hundred and twelve.

[SEAL.] ALFRED R. PORTER,
Clerk of the Appellate Court of the First District, Illinois.

In the Supreme Court of Illinois, to the October Term, A. D. 1912.

ELLA A. BRAND, E. L. BRAND, JR., and E. BELLE BRAND ATWELL, as Executors of the Estate of Edwin L. Brand, Deceased, Appellants,

VS.

THE UNION ELEVATED RAILROAD COMPANY, THE LAKE STREET Elevated Railroad Company, The South Side Elevated Railroad Company, The Northwestern Elevated Railroad Company, and The Metropolitan West Side Elevated Railroad Company, Appellees.

Appeal from Appellate Court of Illinois, First District, Branch A.

Assignment of Errors.

And now come the above named appellants, by Harry S. Mecartney, their attorney and counsel, and show to the Supreme Court of the State of Illinois that in the record and proceedings in the said and foregoing cause there is manifest error; and that the said Appellate Court erred therein to the injury of appellants and to the prejudice of and against their rights in the following particulars, to-wit:

197 First. The said Appellate Court erred in affirming the said judgment of the Superior Court entered against appellants in manner, form and substance as aforesaid.

Second. The said Appellate Court erred in not reversing the said judgment of said Superior Court.

Third. The said Appellate Court erred in not reversing the said judgment of said Superior Court, and in not remanding said cause for a new trial thereof.

Fourth. The said Appellate Court erred in not reversing the said judgment of said Superior Court for each and every of the grounds shown in the assignment of errors filed by appellants in said Appellate Court.

Fifth. The said Appellate Court erred in rendering a judgment for costs against appellants in substance, manner and form as aforesaid.

Sixth. Said judgment of said Superior Court is erroneous and against the law.

Seventh. Said judgment of said Superior Court is erroneous and against the evidence.

Eighth. The said Superior Court erred in instructing the jury to find the defendants not guilty; and the said Appellate Court erred in not holding that the said action of said Superior Court was error.

Ninth. The said Superior Court erred in denying the motion for a new trial made by appellants, and for the reasons and upon the grounds shown in the written motion for a new trial, and for each of said reasons and grounds, as shown in the record herein, and the said Appellate Court erred in not holding that said denial was error.

198 Tenth. The said Superior Court erred in not submitting said cause to the jury; and the said Appellate Court erred in not holding said action of the Superior Court to be error.

Eleventh. The said Superior Court erred in not ruling appellees to produce evidence to meet appellants' evidence, or in default thereof submitting the cause to the jury; and the said Appellate Court erred in not holding that the said action of said Superior Court was error.

Twelfth. The Appellate court's ruling and said judgment are in conflict with and contrary to "Sec. 2," "Sec. 13" and "Sec. 14" of "Article II" of the Constitution of Illinois, and each of them, as specifically claimed in the "7th" ground of said motion for new trial.

Thirteenth. The Appellate Court's ruling and said judgment are in conflict with and contrary to "Sec. 10" of "Article 1" of the Constitution of the United States, providing that "No state shall pass any * * * law impairing the obligation of contracts."

Fourteenth. The Appellate court's ruling and said judgment are in conflict with and contrary to "Sec. 1" of the Fourteenth ("XIV") Amendment to the Constitution of the United States, providing: "Nor shall any state deprive any person of life, liberty or property without due process of law."

Fifteenth. The Appellate court's ruling and said judgment are in conflict with and contrary to the provision in said last quoted section which provides: "Nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws."

199 Sixteenth. The said judgment of the Appellate Court is contrary to the law.

Seventeenth. The said judgment of the Appellate Court is contrary to the evidence.

Eighteenth. The said judgment of the Appellate Court is contrary to the law and the evidence.

Nineteenth. The said judgment of the said Superior Court is in conflict with each of the constitutional provisions set forth in above assignments of error no.'s "Twelfth" to "Fifteenth" inclusive.

Wherefore, appellants pray that the judgment aforesaid of the Appellate Court and the judgment of the Superior Court of Cook

county may be reversed, set aside, annulled, and held for naugh
and that the cause be remanded and full justice be done them
the premises, etc.

HARRY S. MECARTNEY,
Counsel for Appellants.

200 At a Supreme Court Begun and Held at Springfield
Tuesday, the First Day of October, in the Year of Our Lo
One Thousand Nine Hundred and Twelve, within and for t
State of Illinois.

Present:

The Honorable Frank K. Dunn, Chief Justice.
Honorable James H. Cartwright, Justice.
Honorable William M. Farmer, Justice.
Honorable Orrin N. Carter, Justice.
Honorable John P. Hand, Justice.
Honorable Alonzo K. Vickers, Justice.
Honorable George A. Cooke, Justice.
William H. Stead, Attorney General.
Warren C. Murray, Marshal.

Attest:
J. McCAN DAVIS, *Clerk.*

Be it remembered, that to-wit, on the Sixteenth day of Octobe
A. D. 1912, the same being one of the days of the said October ter
of Court aforesaid certain proceedings were had in said Court an
entered of record in the words and figures following, to-wit:

201 8367.

ELLA A. BRAND et al., Ex'rs, etc., Appellants,
vs.
THE UNION ELEVATED RAILROAD COMPANY et al., Appellees.

Appeal First District.

Now on this day come the parties hereto and this being one
the days set apart for the call of the docket under the rules of thi
Court, and it appearing to the Court that —— ——, Appellan
hath filed her-in a duly certified transcript of the record and pr
ceedings of the Court below, together with printed abstracts thereo
and briefs and arguments of counsel in support of the errors assigne
herein, and entered motion to reverse the judgment and reman
said cause and for costs, and the said appellee, —— ——, havin
entered motion to affirm said judgment and for costs and procedendo
and said motions being taken under advisement for final hearing
and the Clerk of this Court reporting that said cause is now read
to be taken, and said cause having been argued orally by Harry S

Mecartney for appellants and Jas. W. Barbour for appellees, is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

202 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court Begun and Held at Springfield on Tuesday the Fourth Day of February, in the Year of Our Lord One Thousand Nine Hundred and Thirteen, within and for the State of Illinois.

Present:

The Honorable Frank K. Dunn, Chief Justice.
Honorable James H. Cartwright, Justice.
Honorable William M. Farmer, Justice.
Honorable Orrin N. Carter, Justice.
Honorable John P. Hand, Justice.
Honorable Alonzo K. Vickers, Justice.
Honorable George A. Cooke, Justice.
Patrick J. Lucey, Attorney General.
Warren C. Murray, Marshal.

Attest:
J. McCAN DAVIS, *Clerk.*

Be it remembered, that afterward, to-wit: on the Twentieth day of February, 1913, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

No. 8367.

ELLA A. BRAND et al., Ex'rs, etc., Appellants,
v.
THE UNION ELEVATED RAILROAD COMPANY et al., Appellees.

Error to —.

Appeal from First District.

203 Docket No. 8367.

October Term, A. D. 1912.

A'g. 31.

ELLA A. BRAND et al., Ex'rs, etc., Appellants,
v.
THE UNION ELEVATED RAILROAD COMPANY et al., Appellees.

Appeal from Appellate Court for the First District.

Mr. Justice FARMER delivered the opinion of the court:

This suit was brought by appellants against appellees to recover damages alleged to have been sustained to their property from the

construction of an elevated railroad in the street upon which the property abutts. Appellant's property fronts east on Wabash avenue in the City of Chicago, and is situated between Jackson and Van Buren streets. Upon the request of the parties the jury viewed the premises, and appellants introduced on the trial the testimony of Christian Florup, who was engaged in the real estate business, and was, and had been since prior to the construction of the elevated railroad, agent for the property and collector of rents of the building. He was the only witness offered upon the question of damages. At the conclusion of the evidence for appellants, the court, on motion of appellees, instructed the jury to return a verdict of not guilty. A motion by plaintiffs for a new trial was overruled, judgment rendered on the verdict and plaintiffs appealed to this court. The court, being of opinion no constitutional question was involved authorizing an appeal direct to this court, transferred the case to the Appellate Court for the First District. That court affirmed the judgment of the Superior court and granted a certificate of importance, upon which plaintiffs below have brought the case by appeal to this court.

204 Numerous errors were assigned in the Appellate Court, but counsel for appellants states in his brief that all of them were withdrawn except those raising the question of the correct rule for assessing damages to property not taken, but affected by a public use, and this is the only question discussed in the briefs in this court.

Appellee's elevated structure was completed and the road put in operation in October, 1897. The witness Florup described appellants' building and its uses and the effect upon the property and its use by the construction and operation of the elevated railroad. He testified to the rentals received from the building before and after the construction of the road and the value of the property before and after its construction. He placed its value at $4,800 per foot before the road was built, and testified that it did not decrease in market value by reason of the construction of the road. About three years after its completion, the property increased in value to $6,500 per foot. The undisputed evidence, therefore, was that the market value of appellants' property was not depreciated by the construction of the road. It is claimed, however, that this was the result of general benefits common to all property in the neighborhood served by the improvement, and that such benefits should not be considered in determining the damages; that only special benefits, such as are a direct physical improvement to the property, like the draining of a wet, swampy tract of land by the improvement, or building a bridge across a stream running through the land, which enables the owner to enjoy it with greater advantage by reason of the improvement, should be considered in determining whether the property is damaged. Appellants contend that the benefits

205 to their property by reason of the improvement which operated to prevent a decrease in its market value, were general benefits; that there were no special benefits, but, on the contrary, the improvement injuriously affected the use of appellants' property by

obstructing air and light, by noise and vibration, and by interference with access to their property, and they insist they are entitled to recover the damage thus resulting without any reference to the other benefits that may have resulted from the improvement.

This question is not a new one in this State. Since the adoption of our present constitution and the passage of the Eminent Domain Act the question has been passed upon by this court a great many times. The first reported cases are, Page v. Chicago, Milwaukee and St. Paul Railway Company, 70 Ill. 324, Chicago and Pacific Railroad Company v. Francis, 70 id. 238, and Eberhart v. Chicago, Milwaukee and St. Paul Railway Company, 70 id. 347. In all three of those cases it was held the true measure of compensation for land not taken by the improvement was the difference between what the property would have sold for unaffected by the improvement, and what it would sell for as affected by it. In the Francis case the court said: "It cannot be said appellee has sustained damage, when his property is worth and will sell for as much or more than if no road had been built." That case was cited and the rule announced adhered to in the Page case. The decision in the Eberhart case, (opinion by Justice Breese) was based upon the Page and Francis cases, and the opinion in the Page case was referred to for a discussion of the proper measure of compensation for property not taken. The rule announced in those cases has, with one exception, been followed in subsequent cases, down to Metro-
206 politan West Side Elevated Railway Company v. Stickney, 150 Ill. 362. That was a proceeding to condemn the right of way across certain lots, in which proceeding damages were claimed and awarded for injury to the parts of the lots not taken. The court instructed the jury that it could not consider any benefits to the property which might arise from the construction and operation of the railroad, unless the evidence showed such benefits were special to the particular property and not shared by it in common with the generality of property in the vicinity of the line of the proposed railroad. In the opinion the court reviews all its previous decisions since the adoption of the constitution of 1870 and sums up its conclusions in the following language: "It therefore follows that every element arising from the construction and operation of the railroad or other public improvement, which, in an appreciable degree, capable of ascertainment in dollars and cents, enters into the diminution or increase of the value of the particular property, is proper to be taken into consideration in determining whether there has been damage, and the extent of it. Thus, the situation of the property, the use to which it is devoted and of which it is susceptible, the character and extent of the business to which it is adapted, before and after the construction of the public work, and indeed, every fact and circumstance legitimately tending to show a depreciation or enhancement of the value of the property, are proper to be considered, so far as they tend to show the actual value of the land without and with the proposed taking for the public use, while, on the other hand, a consideration of facts or circumstances tending to show those general benefits supposed to flow to the community at large, or to the public generally, from the con-

struction of the proposed railroad or other public work, and
207 the effect of which, in determining the injury or benefit to the particular tract of land can not be other than conjectural and speculative, is excluded."

Appellants insist this decision and others in line with it are wrong; that the rule adopted in this state is contrary to the weight of authority in other states and to the views of Mr. Lewis in his work on Eminent Domain; also, that the rule is in conflict with Keithsburg and Eastern Railroad Company v. Henry, 79 Ill. 290, and section 9 of the Eminent Domain act. It is quite true, the decisions in this state upon the question here under consideration are not in harmony with decisions of courts of last resort in some of our sister states, while they are in harmony with the decisions in some states. The conflict between the decisions in this state and the decisions of other States relied upon by appellants is not so much as to a rule of law as it is to the application of the rule. This court is in accord with the cases in other States holding that only special benefits are to be considered in making just compensation for land damaged by, but not taken for, a public use. The difference is principally as to what are general benefits and what are special benefits. Some courts hold that only those benefits are special which directly and physically operate upon the particular property in a manner different from and not shared in common by other property in the neighborhood and which enable the owner to use it with greater advantage. All other benefits which increase the market value of the particular property in common with other property in the neighborhood are held to be general benefits. This view has not been adopted in this state. The rule adopted in this state is thus stated in the Stickney case: "If property is enhanced in value by reason of the improvement, as distinguished from the general benefits to
208 the whole community at large, it is said to be specially benefited, and is to be assesssed for the special benefits, notwithstanding every other piece of property upon or near the improvement may be, to a greater or less degree, likewise specially benefited. (Wilson v. Board of Trustees, 133 Ill. 443.) In other words, it is not such benefit as is special to the particular property thereby excluding the consideration of such benefits as are common to other property similarly situated, but is such benefits as that the particular property is by the improvement enhanced in value,—that is, specially benefited. * * * If a piece of property is enhanced in value, such enhancement,—or, in other words, benefit to the property,—can not be said to be common to any other piece of property. Each piece of property especially enhanced in value is thus specially benefited within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties. It follows, necessarily, that where the benefits are designated as "general benefits," "benefits common to other property," and the like expressions to be found in decided cases, it is meant those general, intangible benefits which are supposed to flow to the general public from a public improvement. * * * By a practically unbroken line of decisions in this State it is well settled that the test, under the present statute, as to whether land not taken is damaged, is the effect

f the improvement upon the value of the land. Under the rule, and is said to be damaged only when there is a diminution in its alue,—a depreciation in its price or worth,—and the compensation equired to be made is the amount of depreciation or diminution in alue occasioned by the construction and operation of the railroad, r other improvement. Special benefits are such benefits flowing from the proposed public work as appreciably enhance the 09 value of the particular tract of land alleged to be benefited. As already said, the fact that other property in the vicinity likewise increased in value from the same cause,—that is, also pecially benefited by the improvement,—furnishes no excuse for xcluding the consideration of special benefits to the particular roperty in determining whether it has been damaged or not, and it has, the extent of the depreciation in value. * * * Hence, ll imaginary and merely speculative damages or benefits are ex- luded from consideration. The consideration of such benefits as nd specifically to enhance the value of the particular property is ot setting off benefits against the damage to the property, but is he simple ascertainment of whether the land has been, in fact, epreciated in price or worth,—that is, whether loss or damage has sulted to the owner—for if his property is of the same value after before the improvement he has sustained no loss."

The only case in this State that is out of line with the Stickney se and those previously and subsequently decided is Keithsburg nd Eastern Railroad Company v. Henry, supra, and that case has ot been followed in any subsequent decision.

Counsel is in error in saying the author of the opinion in the tickney case failed to mention section 9 of the Eminent Domain ct. It is expressly referred to on page 373 in commenting upon he Page case, and that part of the section relied upon by appellants quoted. The section was also quoted in the Page case. The tickney case and the previous decisions, with the one exception, eferred to, have been since uniformly followed and adhered to. he last cases to which our attention has been called are Peoria, loomington and Champaign Traction Company v. Vance, 225 Ill. 70, and Eldorado, Marion and Southwestern Railroad Company v. verett, 225 id. 529. In the Vance case the court said: "Since the doption of the constitution of 1870 it has been uniformly held by this court, in such cases as this, that the measure of damages 10 to land not taken is "the difference in the fair cash market value of the land before and after the construction of the ilroad," or "the amount, if any, which lands not taken will be epreciated in their fair cash market value by the construction nd operation of the proposed road. * * * Under the rule adopted this state for determining whether, or in what amount, property ot taken will be damaged by the construction and operation of a ilroad, any benefits which are not conjectural or speculative, and hich actually enhance the market value of such property, are to be nsidered as special benefits and not as general benefits, within the eaning of the rule that general benefits cannot be considered in termining whether, or in what amount, property not taken will

be damaged. Special benefits do not become general benefits because the benefits are common to other property in the vicinity. The fact that other property in the vicinity of the proposed railroad will also be increased in value by reason of the construction and operation thereof furnishes no excuse for excluding the consideration of special benefits to the particular property in determining whether it has been damaged, and if it has, the extent of the depreciation in value.

In the Everett case the court said: "The real question submitted to the jury, as repeatedly stated in the decisions of this court, was the value of the land not taken, at the time of filing the petition, with and without the improvement, and the fact that other property in the vicinity is increased in value by the construction and operation of the road furnishes no excuse for excluding special benefits to the particular property in determining whether it has been damaged or not. * * * The lands, generally, along the line in this vicinity were coal lands, and might all be benefited by
211 reason of improved facilities for mining and transporting coal. Considering benefits which enhance the value of the particular property is not setting off benefits against damages, but is simply ascertaining whether there are damages or not. If the property is of the same value after as before the improvement the owner has sustained no loss. Damages can not exist if the value of the property is not lessened, and the benefit which the land owner secures as an owner of the property is a special benefit. In determining whether land has or has not been damaged the jury should consider whether the market value of the property remaining will be enhanced by the improvement, although other property in the vicinity will be likewise benefited. (Metropolitan West Side Elevated Railway Co. v. White, 166 Ill. 375). It is true that general benefits affecting the whole community, whether owners of property along the line of a railroad or not, such as increased facilities for travel, the increase of population and enhancing the general prosperity are not to be taken into account; but benefits flowing from the proposed improvement which appreciably enhance the market value of the particular tract of land and offset injuries to it are to be considered, for the purpose of determining the ultimate question whether there are damages to the lands not taken."

We are not disposed now to enter upon a discussion of the correctness of the rule adhered to for forty years, nor do we feel at liberty, even if we were so inclined, to overrule the large number of decisions that would have to be overruled to justify a reversal of this judgment. The judgment is in harmony with the law in this State and is therefore affirmed.

Judgment affirmed.

(See dissent attached).

212 8367.

BRAND et al., Appellants,
vs.
THE UNION ELEVATED R. R. Co. et al., Appellees.

CARTWRIGHT, *J.*, dissenting:

It is with no little hesitation that I record my disagreement with the decision of this case. I am equally averse to overturning established rules of law and substituting uncertainty for certainty, but cannot concur in what I do not understand to be an established rule for the ascertainment of damages to property resulting from a public use. If my disagreement should amount to a confession of want of perception, it is nevertheless a fact that I have not regarded the decisions as establishing a rule so unfair to the citizen and advantageous to the authority invested with the power to take and damage private property for public use as that the question of damage is to be determined solely by the market value of property, regardless of all the elements and conditions affecting such value.

As I understand the decisions, the rule has been that the property owner may recover for all special injuries to his property so far as they affect its fair cash value, and against such injuries may be set off all such benefits as are special and peculiar to the property; but he is neither entitled to recover for injuries common to the public at large nor chargeable with benefits of that character. Illustrating those injuries to property not taken which he is entitled to prove and for which he may recover the consequent damages are the following:

Loss of use of a spring. Peoria & Rock Island Ry. Co. v. Bryant, 57 Ill. 473.

All physical injuries and all inconveniences of every character actually produced by the public use. Jones v. Chi. & Iowa R. R. Co. 68 Ill. 380.

213 The fact that a portion of a farm is cut off by a railroad. Galena & Southern Wisconsin R. R. Co. v. Birbeck, 70 Ill. 208.

Separation of wood, water and timber from the balance of a farm. Chicago & Iowa R. R. Co. v. Hopkins, 90 Ill. 316.

Cutting off a part of a farm from the remainder and inconvenience in reaching a highway. De Boul v. Freeport & Miss. River R. R. Co. 111 Ill. 499.

Injuries arising from inconveniences, such as dividing land as to water, pasture and improvements, although not capable of definite ascertainment; danger of killing stock or injuries to pasture or stock; escape of fire and, generally, all damages reasonably probable from the construction and operation of a railroad. Chicago, Burlington & Northern R. R. Co. v. Bowman, 122 Ill. 595.

The fact that a farm is put in worse shape for cultivation and pasturage; that there is danger of fire; and all other actual inconveniences. Chicago, Peoria & St. Louis R. R. Co. v. Blume, 137 Ill. 448.

The separation of buildings from a well. Illinois Central R. R. Co. v. Normal, 175 Ill. 562.

The increased cost of insurance. Ind. Ill. & Iowa R. R. Co. v. Stauber, 185 Ill. 9.

The size and shape of the parts in which a farm is divided and difficulty of access to the different parts. Chi. Terminal R. R. Co. v. Bugbee, 184 Ill. 353.

Danger from fire. Ill. Iowa & Minn. Ry. Co. v. Ring, 219 Ill. 91.

Danger to stock and loss by fire. Chi. Southern Ry. Co. v. Nolin, 221 Ill. 367.

Noise and vibration if buildings are near enough to be affected.

214 The property owner is entitled to prove all injuries of that kind which are special and which affect the cash value of his property. The benefits that may be set off against such damages are such as accrue to the particular property and are not common to property generally. "The constitutional provision is equally mandatory that property shall not be damaged for public use without just compensation as it is that it shall not be taken for such use without just compensation." (Washington Ice Co. v. City of Chicago 147 Ill. 327). It is true that other property in the vicinity may also be specially benefited in the same manner as in the case of a region where the lands are underlaid with coal of no value without facilities for transportation of which Eldorado, Marion & Southwestern R. R. Co. v. Everett, 225 Ill. 529, is an example. So also numerous farms or pieces of property may be severed into different parts and the injuries be of the same character and special as to each piece of property. The special benefits must affect the property directly and proximately and increase its actual value, and, the court having uniformly laid down these rules and sustained instructions to juries stating them, it would be inconsistent to require the jury to forget it all, disregard the exclusion of general and public benefits, and determine the issue upon the single, bare question whether the property would sell for as much after the construction of the improvement as before it, which necessarily includes all common and general benefits. The only consistent rule is that the jury shall take into account special injuries and benefits affecting the fair cash value of the property, and if the damages exceed the benefits, award to the property owner the difference.

215 This rule, according to my understanding, applies to all cases. In this case damage was claimed to property by the occupation of a public street with an elevated railroad. There were two classes of rights in the street; the one, the public right to use the street for travel and for that only; the other, the right of the property owner of ingress and egress, use in connection with his property and the appurtenant easements. If there was an obstruction to the public use for travel by the iron pillars, there could be no recovery by the owner for consequent damage, but if his right of access was impeded or interfered with or his property rendered less valuable on account of noise, vibration or other natural consequence of the construction and maintenance of the road, the damage result-

ing was special to that property. The thing would be a nuisance if there were no authority of law for its construction and operation, and whenever an act is done which without statutory authority would be a nuisance, the owner of property affected by it sustains a special and peculiar damage different from that sustained by the public in general and may have his action for damages resulting from his individual and distinct right. (Rigney v. City of Chicago 102 Ill. 64). In this case there was a direct physical disturbance of a right enjoyed in connection with the ownership of property, and if there was any damage by reason of the disturbance of the right it was special. Against any such damage general benefits to the public, although enhancing the value of the property in question in common with other property in the vicinity could not be considered. To say that the only test is the market value of the
216 property before and after the improvement, regardless of causes affecting the value, necessarily charges the owner with benefits which this court has repeatedly held could not be done, and makes the owner contribute to a liquidation of special injuries his share of the general benefits derived from the construction and operation of the road. I have understood the oft-repeated declaration that damages are to be based upon actual cash values or necessarily implying a consideration of legitimate elements of damage and benefit and a conclusion therefrom.

217 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court, Begun and Held at Springfield on Tuesday, the Fourth Day of February, in the Year of Our Lord One Thousand Nine Hundred and Thirteen, within and for the State of Illinois.

Present:

The Honorable Frank K. Dunn, Chief Justice.
Honorable James H. Cartwright, Justice.
Honorable William M. Farmer, Justice.
Honorable Orrin N. Carter, Justice.
Honorable John P. Hand, Justice.
Honorable Alonzo K. Vickers, Justice.
Honorable George A. Cooke, Justice.
Patrick J. Lucey, Attorney General.
Warren C. Murray, Marshal.

Attest:
J. McCAN DAVIS, *Clerk.*

Be it remembered, that to-wit:—on the 20th day of February, A. D. 1913, the same being one of the days of the said February term of said Supreme Court, certain proceedings were had in said court and entered of record in the words and figures following; to-wit:

February 20th, A. D. 1913.

Appeal from First District.

No. 8367.

ELLA A. BRAND, E. L. BRAND, JR., and E. BELLE BRAND ATWELL, Executor- of the Estate of Edwin L. Brand, Deceased, Appellant-,

v.

THE UNION ELEVATED RAILROAD COMPANY, THE LAKE STREET Railroad Company, The South Side Elevated Railroad Company, The Northwestern Elevated Railroad Company, and The Metropolitan West Side Elevated Railroad Company, Appellees.

Error to —.

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for Error, and now being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Judgment aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error:

Therefore, it is considered by the Court that the Judgment of the Appellate Court aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said Appellees recover of and from the said Appellants costs by them in this behalf expended, to be taxed, and that they have execution therefor.

218 At a Supreme Court, Begun and Held at Springfield on Tuesday, the First Day of April, in the Year of Our Lord One Thousand Nine Hundred and Thirteen, within and for the State of Illinois.

Present:

The Honorable Frank K. Dunn, Chief Justice.
Honorable James H. Cartwright, Justice.
Honorable William M. Farmer, Justice.
Honorable Orrin N. Carter, Justice.
Honorable John P. Hand, Justice.
Honorable Alonzo K. Vickers, Justice.
Honorable George A. Cooke, Justice.
Patrick J. Lucey, Attorney General.
Warren C. Murray, Marshal.

Attest:

J. McCAN DAVIS, *Clerk.*

Be it remembered, that to-wit, on the Second day of April, A. D. 1913, the same being one of the days of the said April term of Court, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

No. 8367.

ELLA A. BRAND et al., Ex'rs, etc., Appellants,
vs.
THE UNION ELEVATED RAILROAD COMPANY et al., Appellees.

Appeal First District.

And now on this day the Court having duly considered the petition for rehearing filed herein and the Court being now advised in the premises, doth overrule the prayer of the petition and denies a rehearing of this cause.

219 *Authentication of Record.*

SUPREME COURT,
State of Illinois, ss:

I, J. McCan Davis, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of E. L. Brand, Jr. and E. Belle Brand Atwell as surviving executors of the Estate of Edwin L. Brand, deceased, Plaintiffs in error, vs. The Union Elevated Railroad Company, The Lake Street Elevated Railroad Company, The South Side Elevated Railroad Company, The Northwestern Elevated Railroad Company and The Metropolitan West Side Elevated Railroad Company, Defendants in Error, and also of the opinion of the Court rendered therein, as the same now appears on file in my office.

In Testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, this 30th day of September, A. D. 1913.

[Seal of the Supreme Court, State of Illinois.]

J. McCAN DAVIS,
Clerk Supreme Court.

220 Be it remembered, to-wit, that on the 18th day of September A. D. 1913, there was duly filed by the appellants in this court, plaintiffs in error in the writ of error herein mentioned, in the office of the Clerk of the Supreme Court of Illinois a petition for writ of error with assignments of error from the Supreme Court of the United States to the Supreme Court of Illinois addressed to the Hon. George A. Cooke, Chief Justice of the Supreme Court of Illinois with the original order by the said Chief Justice upon the said petition allowing said writ of error, which documents are in words and figures as follows, to-wit:

Filed Sep. 18, 1913. J. McCan Davis, Clerk of Supreme Court.

18—268

221 In the Supreme Court of Illinois.

No. 8367.

E. L. BRAND, JR., and E. BELLE BRAND ATWELL, as Surviving Executors of the Estate of Edwin L. Brand, Deceased, Appellants,

vs.

THE UNION ELEVATED RAILROAD COMPANY, THE LAKE STREET Elevated Railroad Company, The South Side Elevated Railroad Company, The Northwestern Elevated Railroad Company, and The Metropolitan West Side Elevated Railroad Company, Appellees.

Appeal from Appellate Court of Illinois, First District.

Petition for Writ of Error.

Assignment of Errors and Prayer for Reversal.

Considering themselves aggrieved by the final decision of the Supreme Court of Illinois in rendering judgment against them in the above entitled cause, the said E. L. Brand Jr. and E. Belle Brand Atwell, as surviving executors of the estate of Edwin L. Brand, deceased, hereby pray a writ of error from the said decision and judgment to the United States Supreme Court and an order fixing the amount of the bond to be given in this behalf.

And the said E. L. Brand Jr. and E. Belle Brand Atwell, as executors of the estate of Edwin L. Brand, deceased, plaintiffs and appellants in said suit and petitioners herein, assign the following errors in the record and proceedings of the said cause, viz.:

1. The Supreme Court of Illinois erred in affirming the said judgment of the Appellate Court of Illinois.

2. The said Supreme Court erred in not reversing said
222 judgment and in not remanding the said cause to the said Superior Court of Cook County for a trial on the merits.

3. The said Supreme Court erred in deciding that there was no evidence of damage in the case.

4. The said Supreme Court erred in deciding that the claim of damages to the property of plaintiffs was subject to an allowance of benefits, if any, arising from the elevated railroad or improvement in question, taken as a whole, or from the conveniences or facilities furnished thereby.

5. The said Supreme Court erred in not holding that Section 9 of the Eminent Domain Statute of Illinois, namely, Chapter 47 of the Revised Statutes of Illinois, constituted a guaranty against any such allowance for benefits from the said improvement or elevated railroad.

6. The said Supreme Court erred in denying the claim of appellants that the said judgment of the Appellate Court was an impairment of contract and contrary to the "First" paragraph of "§10" of

"Article 1" of the Constitution of the United States, providing that "No state * * * shall pass any * * * law impairing the obligation of contracts."

7. The said Supreme Court erred in denying the claim of appellants that the said judgment of the Appellate Court constituted a deprivation of appellants of their said property without due process of law, contrary to "§1" of the Fourteenth—"XIV"—Amendment to said Constitution, which provides: "Nor shall any state deprive any person of life, liberty or property without due process of law."

8. The said Supreme Court erred in denying the claim of appellants that the said judgment of the Appellate Court is in conflict with and contrary to the provision in said last quoted section, which provides: "Nor shall any state * * * deny to any person
223 within its jurisdiction the equal protection of the laws."

9. The said Supreme Court erred in denying the claim of appellants that the said judgment of the Superior Court of Cook County, which was so affirmed by said Appellate Court judgment, was and is in conflict with each of the constitutional provisions set forth in the above assignments of error Numbers 6, 7 and 8.

10. The decision and judgment of the said Supreme Court constitute (*a*) an impairment of the contract rights of appellants as owners of the property, contrary to said "First" paragraph of "§10" of "Article I" of the Constitution of the United States; (*b*) a deprivation of appellants of their said property without due process of law, contrary to said "§1" of the Fourteenth—"XIV"—Amendment to said Constitution; and (*c*) a denial to plaintiffs under said last named constitutional clause of "the equal protection of the laws."

11. The said decision and judgment of the said Supreme Court, and the said decision and judgment of the said Appellate Court affirmed thereby, and the said decision and judgment of the said Superior Court so affirmed in said Appellate Court, constitute an infringement of the rights of the appellants guaranteed to them by the Illinois Constitution, (*a*) under "§2" of "Article II" thereof, which provides that "no person shall be deprived of * * * property without due process of law: (*b*) under "§13" of said "Article II," which provides that "private property shall not be taken or damaged for public use without just compensation;" and (*c*) under "§14" of said "Article II," which provides that "no * * * law impairing the obligation of contracts * * * shall
224 be passed.

For which errors the said E. L. Brand, Jr. and E. Belle Brand Atwell, as surviving executors of the estate of Edwin L. Brand, deceased, pray that the said judgment of the Supreme Court of Illinois rendered in the above cause on February 20, 1913, be reversed and a judgment rendered in favor of the said appellants, and for costs.

HARRY S. MECARTNEY,
Counsel for E. L. Brand, Jr., and E. Belle Brand Atwell, as Surviving Executors of the Estate of Edwin L. Brand, Deceased.

STATE OF ILLINOIS,
County of Cook, ss:

Harry S. Mecartney being duly sworn deposes and says that he is counsel for the above and foregoing petitioners, E. L. Brand, Jr. and E. Belle Brand Atwell, as surviving executors of the estate of Edwin L. Brand, deceased; that since the rendition of the judgment in said cause in the Supreme Court of Illinois in February 1913, Ella A. Brand, formerly one of the three executors of the estate of said Edwin L. Brand, deceased, has died, and that said E. L. Brand, Jr. and E. Belle Brand Atwell are the surviving executors and all the surviving executors of said estate.

HARRY S. MECARTNEY.

Subscribed and sworn to before me this 15th day of September, A. D. 1913.

[Seal of B. H. Montgomery, Notary Public, Cook Co., Ill.]

B. H. MONTGOMERY,
Notary Public.

225 STATE OF ILLINOIS:
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by E. L. Brand, Jr. and E. Belle Brand Atwell, as surviving executors of the estate of Edwin L. Brand, deceased, to The Union Elevated Railroad Company, the Lake Street Elevated Railroad Company, The South Side Elevated Railroad Company, The Northwestern Elevated Railroad Company, and The Metropolitan West Side Elevated Railroad Company in the sum of One Thousand Dollars ($1000.00), with John Milton Oliver and Mark Oliver as sureties.

GEO. A. COOKE,
Chief Justice, Supreme Court of Illinois.

Dated, September 16th, 1913.

226 Filed Sep. 18 1913. J. McCan Davis, Clerk of Supreme Court.

227 Be it remembered that on the 18th day of September, A. D. 1913, there was duly filed in the office of the Clerk of the Supreme Court of Illinois by E. L. Brand, Jr. and E. Belle Brand Atwell, as surviving executors of the estate of Edwin L. Brand, deceased an original bond for writ of error from the Supreme Court of the United States to the Supreme Court of Illinois, in words and figures as follows, to-wit:

228 Filed Sep. 18, 1913. J. McCan Davis, Clerk of Supreme Court.

Bond on Writ of Error.

In the Supreme Court of the United States.

E. L. BRAND, JR., and E. BELLE BRAND ATWELL, as Surviving Executors of the Estate of Edwin L. Brand, Deceased, Plaintiffs in Error,

vs.

THE UNION ELEVATED RAILROAD COMPANY, THE LAKE STREET Elevated Railroad Company, The South Side Elevated Railroad Company, The Northwestern Elevated Railroad Company, and The Metropolitan West Side Elevated Railroad Company, Defendants in Error.

Error to Supreme Court of Illinois.

Know All Men By These Presents, That we, E. L. Brand Jr. and E. Belle Brand Atwell, as surviving executors of the estate of Edwin L. Brand, deceased, of Cook County, Illinois, as principals, and John Milton Oliver and Mark Oliver of Cook County, Illinois, as sureties, are held and firmly bound unto The Union Elevated Railroad Company, The Lake Street Elevated Railroad Company, The South Side Elevated Railroad Company, The Northwestern Elevated Railroad Company, and The Metropolitan West Side Elevated Railroad Company, in the sum of One Thousand Dollars ($1,000.00) to be paid to them, said obligees, and for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of September, A. D. 1913.

Whereas, the above named E. L. Brand Jr. and E. Belle Brand Atwell, as surviving executors of the estate of Edwin L. Brand, deceased, plaintiffs in error, seek to prosecute their writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled cause by the Supreme Court of the State of Illinois.

229 Now therefore, the condition of this obligation is such, That if the above named plaintiffs in error shall prosecute their said writ of error to effect and answer all costs and damages that may be adjudged if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

(Signed) E. L. BRAND, JR., [SEAL.]
E. BELLE BRAND ATWOOD, [SEAL.]
As Surviving Executors of the Estate of Edwin L. Brand, Deceased.
JOHN MILTON OLIVER. [SEAL.]
MARK OLIVER. [SEAL.]

Witnesses to Signatures:
HARRY S. MECARTNEY.
BERTRAM H. MONTGOMERY.

STATE OF ILLINOIS,
County of Cook, ss:

John Milton Oliver and Mark Oliver, being each duly sworn, on oath depose and say, each for himself:

That we are each of lawful age and are citizens of the County of Cook and State of Illinois, and know the contents of the foregoing instrument to which we have attached our names; that we are each worth above the sum of Five Thousand Dollars ($5,000.00) over and above all debts, liabilities and exemptions.

(Signed) JOHN MILTON OLIVER.
MARK OLIVER.

Subscribed and sworn to before me this 15th day of September, A. D. 1913.

[SEAL NOTARY PUBLIC.] B. H. MONTGOMERY,
Notary Public, Cook County, Illinois.

The above bond approved and to operate as a supersedeas.

(Signed) GEO. A. COOKE,
Chief Justice of the Supreme Court of Illinois.

230 Be it remembered that on the 18th day of September A. D. 1913, there was filed in the office of the Clerk of the Supreme Court of Illinois, an original writ of error, which is hereby attached and is in words and figures as follows, to-wit:

231 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judiciary of the Supreme Court of the State of Illinois, Greeting:

Because, in the record and proceedings, as also in the *recommendation* of the judgment of a plea which is in the said Supreme Court of the State of Illinois before you at the February Term 1913 thereof, being the highest court of law or equity of the said state in which such a decision could be had in the said suit, between E. L. Brand Jr., and E. Belle Brand Atwell, as surviving Executors of the Estate of Edwin L. Brand, deceased, designated as plaintiffs and appellants, and The Union Elevated Railroad Company, The Lake Street Elevated Railroad Company, The South Side Elevated Railroad Company, The Northwestern Elevated Railroad Company, and The Metropolitan West Side Elevated Railroad Company, designated as defendants and appellees, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of such their validity or wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity;

or wherein was drawn in question the construction of a clause of the constitution, or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission; a manifest error hath happened to the great damage of said plaintiffs and appellants, E. L. Brand Jr., and E. Belle Brand Atwell, as Surviving Executors of the estate of Edwin L. Brand, deceased. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 18th day of September, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the District Court United States, Southern District of Illinois.]

R. C. BROWN,
Clerk of the District Court of the United States for the Southern District of Illinois.

Allowed by:
GEO. A. COOKE,
Chief Justice of the Supreme Court of the State of Illinois.

Filed Sep. 18, 1913. J. McCan Davis, Clerk of Supreme Court.

232 Filed Sep. 18, 1913. J. McCan Davis, Clerk of Supreme Court.

233 Filed Sep. 18, 1913. J. McCan Davis, Clerk of Supreme Court.

STATE OF ILLINOIS,
Supreme Court, ss:

I, J. McCan Davis, Clerk of said court, do hereby certify that there was lodged with me as such clerk on September 18, 1913, in the matter of E. L. Brand, Jr. and E. Belle Brand Atwell, as surviving executors of the estate of Edwin L. Brand, deceased, plaintiffs in error, vs. The Union Elevated Railroad Company, The Lake Street Elevated Railroad Company, The South Side Elevated Rail-

road Company, The Northwestern Elevated Railroad Company, and The Metropolitan West Side Elevated Railroad Company:

1. The original bond, of which a copy is herein set forth.

2. Six copies of the writ of error as herein set forth—one for each defendant in error and one to file in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court at my office in Springfield, Illinois, this 30th day of September, A. D. 1913.

[Seal of the Supreme Court, State of Illinois.]

J. McCAN DAVIS,
Clerk of the Supreme Court of Illinois.

234 And afterwards, to-wit, on the 22nd day of September, 1913, the original Citation showing service on defendants in error was filed in the office of the Clerk of the Supreme Court in words and figures following, to-wit:

235 Filed Sep. 22, 1913. J. McCan Davis, Clerk of Supreme Court.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Union Elevated Railroad Company, The Lake Street Elevated Railroad Company, The South Side Elevated Railroad Company, The Northwestern Elevated Railroad Company, and The Metropolitan West Side Elevated Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error, filed in the office of the Clerk of the Supreme Court of the State of Illinois, wherein E. L. Brand Jr. and E. Belle Brand Atwell, as surviving executors of the estate of Edwin L. Brand, deceased, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf. Mr. B. H. Montgomery of Chicago is hereby authorized to serve this citation.

Witness the Chief Justice of the Supreme Court of the State of Illinois, this 16th day of September, A. D. 1913.

GEO. A. COOKE,
Chief Justice of the Supreme Court of Illinois.

Attest:

[Seal of the Supreme Court, State of Illinois.]

J. McCAN DAVIS,
Clerk of the Supreme Court of Illinois.

CHICAGO, ILLINOIS, Sep. 19, 1913.

I, Addison L. Gardner, attorney of record for the defendants in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter appearance in the Supreme Court of the United States.

ADDISON L. GARDNER,
Attorney for Defendants in Error.

(Return of service attached.)

236 *Service of Citation.*

STATE OF ILLINOIS,
County of Cook, ss:

B. H. Montgomery being first duly sworn deposes and says that he served the within citation upon James J. Barbour, Esq. and Addison L. Gardner, Esq., counsel for the above named defendants in error, by delivering a true copy of said citation to each of them personally on the 19th day of September, A. D. 1913.

B. H. MONTGOMERY.

Subscribed and sworn to before me this 20th day of September, A. D. 1913.

[Seal of Ada M. Cartwright, Notary Public, Cook County, Ill.]

ADA M. CARTWRIGHT,
Notary Public.

Filed Sep. 22, 1913. J. McCan Davis, Clerk of Supreme Court.

237 Filed Sep. 22, 1913. J. McCan Davis, Clerk of Supreme Court.

238 *Return of Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Illinois, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Illinois, in the City of Springfield, this 30th day of September, A. D. 1913.

[Seal Supreme Court, State of Illinois.]

J. McCAN DAVIS,
Clerk Supreme Court.

Endorsed on cover: File No. 23,882. Illinois Supreme Court. Term No. 268. E. L. Brand, Jr., and E. Belle Brand Atwell, as surviving executors of the estate of Edwin L. Brand, deceased, plaintiffs in error, vs. The Union Elevated Railroad Company, The Lake Street Elevated Railroad Company, The South Side Elevated Railroad Company, et al. Filed October 3d, 1913. File No. 23,882.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1914.

No. 268.

ELLA A. BRAND, E. L. BRAND, JR., and E. BELLE BRAND ATWELL, As Executors of the Estate of EDWIN L. BRAND, Deceased,

Plaintiffs in Error.

vs.

THE UNION ELEVATED RAILROAD COMPANY, THE LAKE STREET ELEVATED RAILROAD COMPANY, THE SOUTH SIDE ELEVATED RAILROAD COMPANY, THE NORTHWESTERN ELEVATED RAILROAD COMPANY and THE METROPOLITAN WEST SIDE ELEVATED RAILROAD COMPANY,

Defendants in Error.

In Error to the Supreme Court of the State of Illinois.

This writ of error is prosecuted for the purpose of having the Federal Supreme Court review on constitutional grounds the decision of the Supreme Court of Illinois in *Brand* v. *Union Elevated R. R. Co.*, 258 Ill. 133, rendered February 13, 1913.

The cause was tried in the Superior Court of Cook County. At the close of plaintiffs' evidence the court instructed the jury peremptorily for defendants.

A written motion for a new trial was made, setting forth specifically among others the Federal

constitutional grounds herein asserted, and such grounds of complaint have been sedulously urged and preserved in all subsequent proceedings. (P. R., 111-2, 125, 138-9.) Such motion for new trial was overruled and judgment entered on the verdict. (P. R., 19.)

An appeal was first taken to the Supreme Court of Illinois; but that court, holding that the appeal should have been taken to the Appellate Court, transferred the case to the latter court. The assignments of error made upon filing the record in the Supreme Court and entered therein were, under the local system of practice, heard in the Appellate Court without reassignment. This is why the assignments of error heard in the Appellate Court are entitled in the Supreme Court. (P. R., 115.) The Appellate Court affirmed. (*Brand* v. *Union Elev. R. R. Co.*, 169 Ill. App. 449.)

On further appeal to the Supreme Court of Illinois it also ruled adversely to plaintiffs and affirmed the judgment; and they now assert that such ruling infringed their constitutional rights.

STATEMENT.

The case is an action in eminent domain, brought by plaintiffs in error (plaintiffs below), against the Union Elevated Railroad Company, which constructed the elevated railroad, known as the down town "loop" in Chicago, and the four other companies owning lines connecting with the loop and for whose joint use it was constructed. Plaintiffs claimed that damages had accrued to the property of their intestate on Wabash avenue, by the construction and operation of such "loop" railroad in the street in front of the premises.

The road was of the ordinary type of elevated railroad structure, laid upon upright posts placed in the street roadway with cross-beams, broad lateral girders, and wooden cross-ties and rails on top thereof, in all about thirty feet high. (P. R., 42.) This road had the special feature of being used by four different supplying roads or feeders, and hence was specially noisy and offensive to abutting owners and their tenants.

A brief reference here to the locality and surrounding circumstances:

The "down town" or central business district of Chicago—the heart of its intensified commercial life —is comprised within an area of approximately one and one-half square miles hemmed in by Lake Michigan on the east, the main branch or outlet of the Chicago River on the north, the south branch of the Chicago River on the west, and at the time the cause

of action arose herein it "tapered off" at about Congress street on the south.

The line of the "Loop" road is a rectangle with sides approximately one-half and three-fourths of a mile long, viz.: North and south on Wabash Avenue between Van Buren Street and Lake Street; west and east on Lake Street between Wabash Avenue and Fifth Avenue; north and south on Fifth Avenue between Lake Street and Van Buren Street, and east and west on Van Buren Street between Fifth Avenue and Wabash Avenue. Trains run in each direction on different tracks around this Loop. It traverses and encloses the greater part of the main business district of the city.

The following sketch taken from a published and well used Chicago map, shows generally the location of the loop with reference to the various streets in the district, and is here appended for the convenience of the court.

MAP

TOO

LARGE

FOR

FILMING

Prior to the advent of the "loop" railroad in question three elevated railroads had been established and put in operation in Chicago, between this main business center and outlying districts of the city, viz.:

(1) The South Side or "Alley" line (operated by the South Side Elevated Railroad Company), which was constructed to serve generally the South Division of Chicago, and which had a terminal at Congress street one block south of Van Buren street between Wabash avenue and State street. (It later was extended by "curving" onto Wabash avenue and then extented north to connect with the Loop at Van Buren, viz: the southeast corner thereof.)

Two lines which were serving generally the West Division of Chicago, viz:

(2) The Lake street line (operated by the Lake Street Elevated R. R. Co.), which crossed the river at Lake street, and as first constructed, turned south on Market street just east of the river, south to Madison, where it had its first "down town" terminal. It later had extended its line from Market street east on Lake to Wabash avenue. Still later part of this extension, viz., between Fifth and Wabash avenue formed the north side of the "Loop," and hence the connection of this road with the Loop was at the junction of Lake street and Fifth avenue, viz.: the northwest corner thereof.

(3) The Metropolitan line with a down town terminal on Franklin street between Van Buren street and Jackson boulevard and extending west with branches northwest and southwest. (It later was extended south in a curve to Van Buren street and then

east on Van Buren to connect with the Loop at Fifth avenue.)

(The red rings on above plat show the location of the *ante*-loop down town "L" terminals. The hand points to location of Brand property.)

A fourth line called the Northwestern line (to be operated by the Northwestern Elevated R. R. Co.) had been authorized and was at the time that the "loop" road was ordained, in process of construction, which was intended to serve the North Division of Chicago, and whose line as it approached the down town district was located on Fifth avenue. Its terminal had apparently not been definitely located but when and as finally constructed it joined the loop at Fifth avenue and Lake street, viz., at the northwest corner thereof. (P. R., 43.)

One of the "Division" roads, so to call them, viz.: the South Side line, was using steam engines at the time of loop construction, and did so for several years thereafter (P. R., 47, 48); and the ordinance here offered, covering the Wabash avenue side or "square" of the loop (providing generally for electricity as a motive power), gave this line permission to continue to use steam for a period of three years from its passage. (P. R., 102, clause "seventh.")

The plan of the Loop road was to connect the four "division" roads so as to allow all trains approaching the down town district to "loop" the same and return on continuous passage.

CHARACTER OF THE ACTION—AN EMINENT DOMAIN PROCEEDING.

Eminent domain proceedings in Illinois are provided for as follows, viz.:

Under the constitution of Illinois, wherever private property is "taken or damaged" for public use, "just compensation" is to be made therefor.

Extracts from present Constitution of Illinois (adopted in 1870):

"ARTICLE II.

BILL OF RIGHTS.

"§2. No person shall be deprived of life, liberty or property, without due process of law. • • • • •

"§13. Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law. • • • • •

"§14. No *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities, shall be passed."

Rev. Stat. Ills., 1895, p. 54, 55.

Rev. Stat. Ills., 1912, p. LIV., LV.

"ART. XI.

"§14. • • • The right of trial by jury shall be held inviolate in all trials of claims for compensation, when in the exercise of the said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right."

Rev. Stat. Ill., 1895, p. 73.

Rev. Stat. Ill., 1912, p. LXXIII.

Extracts from Illinois Statutes:

CHAPTER 47.

EMINENT DOMAIN.

Act in force July 1, 1872.

"1. Compensation—Jury.) §1. *Be it enacted* * * * That private property shall not be taken or damaged for public use without just compensation; and that in all cases in which compensation is not made by the state in its corporate capacity, such compensation shall be ascertained by a jury, as hereinafter prescribed.

"2. Proceedings—Parties.) §2. That in all cases where the right to take private property for public use, without the owner's consent, or the right to construct or maintain any public road, railroad, plankroad, turnpike road, canal or other public work or improvement, or which may damage property not actually taken, has been heretofore or shall hereafter be conferred by general law or special charter upon any corporate or municipal authority, public body, officer or agent, person, commissioner or corporation, and the compensation to be paid for or in respect of the property sought to be appropriated or damaged for the purposes above mentioned cannot be agreed upon by the parties interested, * * * it shall be lawful for the party authorized to take or damage the property so required, * * * to apply to the judge of the Circuit or County Court, either in vacation or term time, where the said property or any part thereof is situate, by filing with the clerk a petition, setting forth, by reference, his or their authority in the premises, * * * and praying such judge to cause the compensation to be paid to the owner to be assessed.

* * * * *

"View of Premises—Verdict.) Sec. 9. Said jury shall go upon the land sought to be taken or damaged, and after hearing the proof offered make their report in writing, so as to

clearly set forth and show the compensation ascertained to each person thereto entitled. Provided, that no benefitsor advantages which may accrue to lands or property affected shall be set off against or deducted from such compensation in any case."

Rev. Stat. Ills., 1895, pp. 749, 750.
Rev. Stat. Ills., 1912, p. 1099, 1101.

Where then, property is formally proposed to be "taken or damaged" the corporation or municipality promoting the work is required to file a petition to condemn under the eminent domain statute of Illinois and an inquiry as to the compensation is to be made by jury.

Where, however, the public improvement is to be laid entirely in a public street (or alley or other public way) and does not physically appropriate any part or parcel of a *private* lot or tract abutting thereon, and where the company *denies* any damage done to such property, it may—provided it has public authority or permission to construct its work in the street—proceed to erect the work *without* formal condemnation either in advance or after construction.

The owner of an abutting lot, however, claiming damages thereto, can, in such case, *sue in a common law action* for such damages; and upon proof that the property has been damaged by such interference with its easements—that is, reduced in its market value,—he can get a money judgment against the corporation; and if the same is not paid he can have a first lien formally established against the road, and if the claim shall not be satisfied in a reasonable time, cause its removal.

The courts of Illinois hold, (1) that the constitutional requirement as to compensation for "damages" is just as imperative as in the case of property "taken," and wherever suffered they must be paid; (2) that the legislature had, however, failed to make the statutory proceeding imperative in all cases of purely a *street* use (at least when it does not appear that the abutter has the "fee" of the street), and (3), since it cannot be ascertained in advance whether there is damage or not, (where the same is not admitted in advance), the owner can have, and is put to, his common law remedy.

Stetson v. *Chicago*, 75 Ill. 74.
Rigney v. *Chicago*, 102 Ill. 64.

In such a case, the owner usually sues in trespass on the case—which is the form of the present action.

And even though he may not have the "fee" title to the bed of the abutting street his street rights are actual easements or "in the nature of easements," and are "private property" as definitely as in the other instance.

Same cases, and Field v. *Barling*, 149 Ill. 556 (565, 571, 573).

"Common law" court procedure (with, of course, many modifications made by statute) is in vogue in Illinois.

It has been settled that such common law action (like the instant case) is in its essence simply *an eminent domain proceeding*, and that all *rules of evidence* as to *damages and compensation* applicable to the statutory proceeding are applicable to such common law case, the same as if the public agency

had admitted damage in the first instance "and a proceeding had been brought under the statute to ascertain the damage."

Rigney v. *Chicago, supra.*

C. & E. I. R. R. Co. v. *Loeb,* 118 Ill. 203 (214).

Penn. Mutual L. Ins. Co. v. *Heiss,* 141 Ill. 35.

Aldis v. *Union Elev. R. R. Co.,* 203 Ill. 567, 572, 3, 5 (involving this same "loop" railroad and the test "abutters" case against it, decided in 1903).

Opinion of Appellate Court in this case, *supra* (p. 450).

So, too, in Illinois, the structure is treated as *permanent;* and damages are recoverable in one "lump" sum and are deemed to have accrued upon the instant of the establishment of the public work and its being put into actual operation.

Same cases.

So, too, although local *municipal* eminent domain proceedings are specially provided for under a separate statute, Art. IX of Chap. 24, Rev. Stat. Ill. (1895), "Cities, Villages and Towns" (not directly involved here and hence not quoted here but referred to *infra* in argument Point X), without express reference to said general eminent domain statute it is held that Section 9 of said domain statute applies to such a proceeding.

Harwood v. *Bloomington,* 124 Ill. 48, 50.

In the test case of *Aldis, supra,* the defendants in error here claimed that the fact that this loop road was local and located in the street differentiated it from ordinary commercial railroads in respect to

street damages, etc., but this claim was overruled, and it was held subject to the general railroad law of the state.

In Illinois there is no distinction made, as respects the right of an abutter to recover damages, between public works constructed by "private," *i. e., quasi* public corporations and those constructed by municipalities, such as is referred to in *Sauer* v. *New York*, 206 U. S. 536.

(*Rigney case, supra.*)

Uniform principles, therefore, as to compensation benefits and damages apply to all eminent domain proceedings in Illinois and are based on such constitutional clause and statute.

The declaration averred that the loop road had been constructed and put in operation on October 3, 1897—in the lifetime of said Brand—setting forth in detail the character of the structure, etc., and averred that the property in question had been damaged or reduced in its market value to the extent of $25,000; "wherefore, the defendants are bound to make compensation to plaintiffs therefor under the Constitution and Laws of Illinois." (P. R., 4-7.)

The Proven Facts.

The premises in question are 25 feet wide fronting east on Wabash avenue, Chicago, and 171½ feet deep to an alley. The five-story and basement building on the lot had been constructed years before the advent of the elevated road. (P. R., 39.)

Wabash avenue is 100 feet wide at this point.

The elevated structure (built in 1897 and completed and put in operation on October 3rd of that year, P. R., 40, 41) occupies the middle of the street and the upright posts supporting it are placed about eighteen inches or two feet from the outer track of the double car tracks which are on the street surface. (P. R., 42.) Several hundred feet south of the property is Van Buren street, upon which is constructed the south line or side of the square "loop." At the juncture of Wabash avenue and Van Buren street (the southeast corner of the loop) the "South Side" or "Alley L" line is taken on. At this point a switch tower is maintained upon the track platforms and cars there pass from one track to the other with unusual noises, *i. e.*, unusual even to elevated roads. (P. R., 43, 45, 91, 93.)

Mr. Edwin L. Brand purchased the property in 1889, paying therefor $80,000, as shown in his deed, subject to an incumbrance of $30,000. (P. R., 33.) He died in 1900 and appellants, his executors, commenced this suit on October 2, 1902.

Plaintiffs offered a street sketch of the road, showing merely in skeleton outline the location of the rails of the road and of the upright posts. (P. R., 87, 88.)

Plaintiffs offered, too, the ordinance under which the road had been constructed, showing that it had been authorized for the joint use of the defendant Union Company and all four "feeder" companies, defendants in error. Such ordinance was passed in October, 1895. (P. R. 100.) They called but one witness, Florup, who had been the collector of rents and the agent for the building (and for a number of other buildings) since its purchase in 1889, first for Mr.

Brand in his lifetime and afterwards for his executors. (P. R., 32.)

Mr. Florup's testimony was in substance as follows:

1. He described the building or premises and the elevated structure and its uses. (P. R., 39, 40.)

2. He testified to and described the damaging physical effect of the road structure upon the property and its use—the noise, vibration, dirt or dust, obstruction of light and access, etc. (together with smoke and ashes for the first several years of operation of one of the lines.) (P. R., 41-48.)

These effects—testified to and uncontradicted—were, as matter of law, a positive physical damage to the property, within the meaning of the provision of the Illinois Constitution above referred to. *Aldis* v. *Union Elevated Railroad, supra,* pp. 571, 575.

3. He gave the rentals of the building for about three years before the "loop" road was built, showing that the total rent of the entire building for the year 1894 was $6,000 and for the years 1895 and 1896 it was $7,500. During the year 1897—while the structure was in actual process of construction—and the early part of 1898 the upper floors were remodeled and a passenger elevator was installed, and operated by the landlord. (P. R., 49-55, 90, 91.)

The first floor and basement had been rented to one Camp at a monthly rental of $350 just before the building of the "loop" structure commenced, the term extending from May 1, 1897, until May 1, 1898, just following its actual completion. Following this, such space was re-rented at *a loss,* viz: $300 per month. (P. R., 53, 54.)

During the year May 1, 1898, to 1899, two of the upper four floors—newly remodeled—remained vacant; and hence there was a *further* loss on this account in actual rental receipts, for this important or test year *immediately succeeding* the establishment of the work. (P. R., 54.)

Beginning with May 1, 1899, and continuing for *at least two years* thereafter, the rental of the entire building was but $8,400, a small advance over the ante-loop rental, with a remodeled building available, and the owner *operating* it. (P. R., 50, 55, 90, 91.)

In view of the proven conditions, the jury were entitled to infer from this evidence *alone a definite loss in rents* during the post-loop period over those of the ante-loop years. (P. R., 97.)

Aside and apart from all this it was shown that just about the time the loop was completed and put in operation the effects of the panic of 1893 had about spent themselves or become exhausted, and there had been a revival in business in Chicago and throughout the country generally, spoken of as "a boom," and there had been, too, a general advance in the value of real estate throughout the city.

It was also attempted to be shown that property in the corresponding block on Michigan avenue to the east, and on State street, to the west, were worth less than property in the Wabash avenue block in question prior to the loop, and after the loop had been built were worth more. The evidence was excluded. (P. R., 55, 56, 61.)

The witness Florup gave as his *estimate*, that immediately prior to the loop construction the prem-

ises in question—*exclusive* of the building—were worth about $4,800 per front foot, and that immediately after, and *for at least five years thereafter, continued to remain at about the same value.* (P. R., 59, 60.) (That is, in spite of the better business "boom" conditions, the general advance of real estate values in the city, a large increase in population of the city, etc.)

(*Note*—There was no elevated railroad station in the block upon which the property abutted.)

The Decision of the Trial Court.

Upon this showing the trial judge ruled (P. R., 108-9):

1. That the "true question" involved was: "Whether there has been a physical interference with the rem—the thing itself, the property. It must be something which especially injures the property, the real estate, or as you might well put it, the right to real estate."

2. That hence the question was: What was the property worth "with" and "without" the structure?

If worth as much "with" as "without," there could be no recovery.

3. That the *criterion* by which to make the test was *the evidence* as to what the property was worth *before* and *after* construction of the work.

4. That as the only witness for plaintiffs had stated that *in his opinion* the property—that is, the ground—was worth as much "after" as "before," *his opinion* was *conclusive* of the issue, although the

court had *"to assume that the jury found that this structure interferes in some way with the ingress or egress of the premises in question."*

5. That while it was true that the property might have *increased* in value *had it not been for the structure in question*, plaintiffs' cause of action was in fact or in law *not* for a *depreciation* in value, but that *"the structure prevented its appreciation,"* and that *"there is no evidence of depreciation at all."*

Thereupon the trial court instructed the jury to return a verdict for defendants, and verdict and judgment thereon for defendants accordingly followed.

Upon the record as thus presented several propositions are obvious:

First. That the expert opinion of the one witness called by plaintiffs was *not conclusive* evidence that the market value of the property—ground *or* building—*was actually* as great "after" as "before" the structure was erected.

For, since plaintiffs could have proved their case *without or independently of the opinions of any witnesses,*—nay, had actually *done* so—the expert opinion of Mr. Florup should not on any theory be held to overcome or cancel entirely the effect of the *other* evidence of damage—and resultant loss in value—which he himself gave and also the evidence of that which the jury would know and appreciate the same as if they had *witnessed* the structure and its operation.

That is, (1) evidence of *reduced store rental;* and

(2) the evidence as to *obstruction of light and access* caused by the structure, and (3), as to the *vibrations* and *noise, dirt* and *ashes,* etc., suffered from its operation.*

There being such positive evidence of damage, the case should have been left to the jury to determine. The provision of the Illinois Constitution above referred to so required.

Second. Even if the holding had been *actually* worth as much "after" as "before" such erection, it did not necessarily follow that it was worth as much *"with"* as *"without"* the structure. (For there are always elements of business conditions, increase or decrease of population, other neighborhood enterprises, business changes, establishment of new or improvement of existing means of transportation, etc., which usually attend the establishment of *any* public enterprise and each of which enters into and affects market value.)

That is to say, if at the time the structure had been erected and put in operation, the property *was due,* under general business and other existing conditions, to *instantly increase* in value, but *did not,* this *alone and of itself* was evidence that the road had produced *a market damage.* For to "keep from appreciating in market value" is a damage to market value if anything at all.

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*For, in testing the question whether plaintiff has furnished evidence tending to sustain his case, the sole question is, whether or not there can be culled from all the evidence furnished by plaintiff proof of facts which standing alone would tend to prove the averments of his declaration, laying out of view all countervailing evidence, though furnished by the plaintiff himself.

Fraser vs. Howe, 106 Ill. 563 (574), Scholfield, J. (the leading Illinois case upon the subject).

But the plaintiffs *further* claimed what it here and now claims:

Third. That in determining the question *whether* the property was worth as much "with" as "without" the structure, only "direct, proximate and physical" effects or elements damaging and beneficial alike, could be considered. (This scope to the inquiry was specifically drawn or admitted at the outset of the trial judge's opinion—viz.: "a physical interference with the *rem*" or a "direct injury," etc. —but was later lost in the confusion of his *dicta*.)

In other words, in considering the effect upon the property of the **structure** *itself, and the* **fact** *of its dedication to a railroad use or operation, the increased "travel facilities" furnished by the* **establishment of the railroad in its entirety**—*and any supposed market value benefit therefrom—must be eliminated from the reckoning in order to give the owner "just" compensation and allow him to share in the benefits from the public improvement or enterprise.*

And plaintiff claims as below, that this right was clearly assured him under a specific Illinois statute, which had also been so construed before Mr. Brand's purchase.

So that even *if* the proof had shown plaintiffs were to admit that the property were worth as much with the entire "loop" railroad constructed and put into operation as without it, they would still be entitled to their "direct, proximate and physical" damages actually proven.

———o———

In order to get a test of the main or third question just stated (possibly not only for this case but also for application in other suits of like import then pending against the elevated railroad companies and to avoid a possible reversal on other grounds leaving such question undecided), and to preserve at the same time the constitutional questions involved, the plaintiffs in error confined their arguments in the Appellate Court of Illinois as well as in the Supreme Court, and as they do here to the issue just mentioned as "Third," and their constitutional rights thereunder (both State and Federal in the State court and of course only Federal here).

This is referred to in the Appellate Court opinion, (p. 451), and they deny this dual featured claim upon its merits and decide it against plaintiffs.

In the Supreme Court opinion another reference is made to this same feature as follows:

> "Numerous errors were assigned in the Appellate Court, but counsel for appellants states in his brief that all of them were withdrawn except those raising the question of the correct rule for assessing damages to property not taken but affected by a public use, and this is the only question discussed in the briefs in this court." (258 Ill., p. 134.)

We assume that this will not be taken here as any intimation that plaintiffs in error meant to waive argument upon any assignments of error of constitutional rights based on their contention as to assessing damages; and no such claim will be made by opposing counsel.

We deem it unnecessary therefore to have the briefs certified here to show the distinct points made therein and cases cited thereunder bearing upon the Fed-

eral constitutional grounds which have been urged from the trial court "up." For the assignments of error constitute the *primary* document for showing the issues raised in upper court appeals; and this court will never presume that any of them have been waived or abandoned.

Counsel can not and will not claim that plaintiffs have waived any of their constitutional claims based upon the statute in question.

Nevertheless, as counsel in their printed motion to dismiss have referred to our brief upon the petition for writ of error (presented only to the chief justice of the Illinois Supreme Court and ordinarily no part of the record) and have too narrowly quoted this feature of the matter, we here quote the full concession made in our briefs in that court (pp. 8, 9) to unmistakably define the scope of the case as thus narrowed, and to which—notwithstanding the assignments of error are broader or fuller—we seek to hold ourselves in this court:

> "Appellants withdraw all and every their assignments of error or parts thereof as will leave open upon this record this one question, and will save all their legal and constitutional rights claimed in respect thereto, viz.:
>
> "Assuming that the evidence adduced on the trial and shown in this record tended inevitably and only to show that the property in question was worth as much after the railroad in question had been constructed as before it was constructed, or as much with the railroad constructed as without it, that the cause should still have gone to the jury.
>
> "Or, differently worded: That in considering the effect upon the premises in question from the railroad structure in question, the jury must exclude from consideration the enhancement in value of the property in question, if any, result-

ing from the facilities furnished by the improvement."

Plaintiffs' waiver, then, of all but the one question of law expressly "*saving* all their legal and *constitutional rights* in respect thereto" operated of course and here operates only as a waiver of the entire case *if* their claim as to each and all of such constitutional questions should be held not well taken.

This leaves the question on the merits "open" on the record, that is: Whether a Federal right is infringed in either of the following respects, viz:

1. Does the ruling of the Supreme Court of Illinois affirming the rulings and judgment of the lower courts herein,—to the effect that the direct physical damage to plaintiffs' property by the construction and operation of the railroad in question (which was shown by the evidence,) might be (and in fact here was) compensated and extinguished (or offset and diminished) by common, general or local benefits resulting (or here assumed to flow or result) to the whole community or locality from this railroad enterprise,—impair the contract right of plaintiffs in error as owners of such property?

2. Does such ruling deprive the plaintiffs in error of their property without due process of law, secured to them by the Constitution and Statute of Illinois, and by the settled rules of law and of property under which their property was acquired and held; or deny to them the equal protection of such law?

3. The trial court here, however, in fact, went much farther, and ruled, in effect, that such damage to plaintiffs' property here was (and so might lawfully be) compensated and extinguished by any ap-

preciation in the meantime in the value of their premises from other causes having no relation to the railroad enterprise, (*e. g.*, a general prevailing advance in the market values of property in the city from other causes, of which there was evidence here,)—provided only that the market value of the property was as much *after* as *before* the coming of the railroad. Does not this make the invasion of our constitutional rights only more obvious?

4. Does the ruling of the Illinois Supreme Court, (affirming that of the lower courts,) by which the plaintiffs in error were deprived of the determination and finding of the jury upon the questions of fact as to the damages to their property, and as to the amount, if any, of the just compensation therefor, as expressly provided by the provision of the Illinois Constitution herein quoted, impair their contract rights or deprive them of their property without due process of law or deny them the equal protection of the law—there being here, as hereinbefore stated, *direct evidence* before the jury of such substantial damage?

5. Taking the entire ruling of the Illinois Supreme Court, as a whole, by which the ruling and action of the trial court (holding, as matter of law, that upon the evidence there was no case presented for the recovery of damages, under the constitutional provision therefor and the statute enacted in pursuance thereof,) was sustained and affirmed,—are the rights or any of them secured to plaintiffs in error by such provisions of the Federal Constitution, or either of them, infringed?

The Appellate Court judges, expressly acknowledging the binding effect on them of certain later

opinions of the Illinois Supreme Court, which they construed to call for the same, affirmed the trial court's judgment *despite their "own personal views"* as to the merits of the question. But they granted a "certified" appeal to the Supreme Court, transferring the entire cause, issues and record to the latter court. 169 Ill. App. 449 (452).

In other words, they were of opinion that the matter was *still open* for a reconsideration by the Supreme Court of Illinois before it should be to any extent further foreclosed.

As said above, the Illinois Supreme Court affirmed. Mr. Justice Cartwright filed a dissenting opinion, holding that the prior rulings of that court *had always* confined the scope of the inquiry to the question of mere "physical" effect, and that *that* had always been the *settled* law of that state since the present constitution went into effect in 1870. (P. R., 126, 133.)

PLAINTIFF'S CASE IN OUTLINE.

(The italics here and in quotations in this brief, where not otherwise noted, are ours.)

We here re-quote Section 9 of the 1872 eminent domain statute, which has remained in force ever since, viz.:

> "Sec. 9. Said jury shall go upon the land sought to be taken *or damaged*, and after hearing the proof offered make their report in writing, so as to clearly set forth *and show the compensation ascertained to each person thereto entitled.* Provided, *that* **no benefits or advantages** *which may accrue to lands or property* **affected** *shall be* **set off against or deducted** *from such compensation* **in any case.**"
>
> Rev. Stat. Ill. (1912), p. 1101; Chap. 47, Sec. 9.

The claim of plaintiffs then in its full "distributive" showing is this:

First. That to exclude them as property owners from sharing in the *local or "district"* or *"community" market benefit* if any, arising from the *establishment* of the public improvement *as a whole* is clearly *unjust* and is *per se, i. e., in principle* an impairment of their contract rights, and a denial of the "equal protection" (or benefit) "of the laws" and also a "deprivation of property without due process of law" forbidden by both the State and the Federal Constitutions.

Second. That *in addition* to being an *unjust* rule, it is violative of said above quoted *express* guaranty of the Illinois Constitution in reference to "just compensation"; for this clause, *independently of* the statute referred to in the next paragraph—had been *specifically adjudged by a number of Illinois cases* some arising before such statute was passed and others afterward, to have *excluded* such general or "local" market benefit.

Third. That *in addition,* such a ruling is a violation of the *plain, specific* and *comprehensive* terms of Section 9 of the Illinois Eminent Domain *statute*—a statute which the Illinois Supreme Court had once said in practically the initial case construing it, *"is too plain to bear construction."* (*R. R.* v. *Henry,* 79 Ill. 290.) (Treated in Points III and X of Brief, *infra.*)

That is to say, that this express *statute* upon its *face,* and by *reason of its own vigor forbids* such a ruling as was here made, and that the latter is "a deprivation of property without due process of law."

(That as a matter of fact, the language of the stat-

ute on its face forbids in effect the allowance of even *special* benefits, and it has to be strained to *some* extent to do so. But to go still further and include or allow in offset to *special damage, "general"* or "local" or "district" or "neighborhood" or "community" market *benefit* accruing from the improvement *in its entirety,* is to doubly violate the terms of the statute or to do so with double force.)

Fourth. That *in addition* to the plain *injustice* involved in the ruling, *in addition* to the settled rulings under the Illinois *constitutional* clause, and *in addition* to the *plain demands* of the statute by reason of its *bare terms, a long line of consistent decisions covering a period of over* 17 *years* had been rendered *construing* this statute and *uniformly* laying down a rule *in consonance with its plain terms; after* which and *on the faith of* which plaintiffs' intestate *purchased the premis. es in question* (in 1889). (As per decisions in Point II of Brief, *infra.*)

Further decisions of like import continued to be rendered for *five years more; after* which—and shortly before this loop structure had been ordained —the decision of *R. R.* v. *Stickney,* 150 Ill. 362, was rendered, in which it was attempted for the first time to reverse such rule.*

*We say, "attempted to reverse such rule." We show, infra (Points IV and V), that it attempted to modify the rule in one respect, in the same breath affirming it bodily—resulting in a pure contradiction on its face. And in the subsequent decisions the few which attempt to follow it result in the same way—a pure contradiction; while the others distinctly reaffirm the prior cases and the settled rule, and are so distinctly and squarely in line with it that we can safely claim (as held in effect in the dissenting opinion) that the entire current of authority for the whole forty year period is uniformly in line with this plain statute—ignoring that which is heresy in the language of the Stickney case ruling, and the few cases that repeat it.

However, the plaintiffs' right here would be unaffected, even if the Stickney case be treated as a distinct modification in substance and effect of the prior and settled rule, and even though the later cases were treated as cases consistently following such departure.

(Plaintiffs claim, of course, to be entitled to the benefit of these additional rulings, confirming as they do, the state of the law as it existed at the time of Brand's purchase.)

Plaintiffs then assert: *That a rule of law so established cannot be reversed without prejudice to their constitutional rights,* etc. That therefore the late decision and judgment here attacked fall within the pale of legally arbitrary ones and the same constitute an "impairment" and a taking, etc., "without due process," etc., under the rule most clearly established in:

Muhlker v. *Harlem, etc., R. R.*, 197 U. S. 544.

Great Southern Hotel Co. v. *Jones*, 193 U. S. 532.

For, the proceeding here was in effect a proceeding to take "property" on behalf of the State itself or of one of its constituted authorities; and in such a case, even though there has been an actual trial, regular on its face, this court will review the proceedings where it is claimed that a definite property right has been *actually* taken without compensation.

C. B. & Q. R. R. v. *Chicago*, 166 U. S. 226.

(The rules of these cases are so well known to the court that they are not repeated in the brief below.)

We understand that it is sufficient here to establish the *last* proposition, viz., as to a reversal of rulings, etc. But it certainly lends further strength to plaintiffs' case to show that the said prior rulings and such *plain statute* are in consonance with the *express* provisions of the Illinois Constitution, and

that in addition thereto the rule they announce is *overwhelmingly supported by authority* and held to be *plainly just* by all the well considered cases of late years.

But we further add:

Fifth, that such "community" benefits are absolutely *incapable* of even *approximate estimation*—they are "*uncertain, incapable of estimation and future*" (*Beveridge* v. *Lewis*, 137 Cal. 619, 624 *infra*); that such a ruling, assuming to estimate and set them off against damages, opens wide the door to speculative evidence not only increases but *multiplies* the length and expense of trials, and produces and is ever bound to produce in jury cases *chiefly disagreements;* that *in and of itself* it amounts to a *denial of justice*—and certainly a denial of "justice freely and without delay;" while in the few jurisdictions where the rule *has* been attempted to be applied (as in New York) it has produced such a plethora of speculative, costly and uncertain litigation as to shock our entire judicial and professional conscience, and to render such plank in the "bill of rights" as applied to such *class* of cases—at least largely—*a farce*.

Specification of Errors.

The assignment of errors repeat in different language the claim that the decision of the Supreme Court of Illinois infringes the "impairment of contract" the "due process," and "equal protection" clauses of the Federal Constitution. (P. R., 138, 9.) That is to say,

First, that the Supreme Court of Illinois erred

in deciding that the claim of damages to the property of plaintiffs was subject to an allowance of benefits, if any, arising from the elevated railroad or improvement in question taken as a whole, or from the conveniences or facilities furnished thereby; and in deciding that Section 13 of Article II of the Illinois Constitution or Section 9 of the Eminent Domain Statute of Illinois, namely, of Chapter 47 of the Revised Statutes of Illinois, did not constitute a guaranty against any such allowance; and that such ruling and judgment denying the claim of plaintiffs constitute

(a) An impairment of contract contrary to the "First" paragraph of "§10" of "Article I" of the Constitution of the United States, providing that "No state * * * shall pass any * * * law impairing the obligation of contracts;"
(b), A deprivation of appellants of their said property without due process of law, contrary to "§1" of the Fourteenth—"XIV"—Amendment to said Constitution, which provides: "Nor shall any state deprive any person of life, liberty or property without due process of law;" and
(c) They are in conflict with and contrary to the provision in said last quoted section, which provides: "Nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws." (Ass'ts of error 4, 5 and 10.)

Second, (the same thing stated in another way): That the said Supreme Court erred in denying the claim of appellants that the said judgment of the Superior Court of Cook County, as so affirmed by said Appellate Court judgment, constituted an infringement severally of each of said clauses of the Federal Constitution. (Ass't of error, 9.)

Third. For that by the action, opinion, ruling and

judgment of the Supreme Court of Illinois, herein in sustaining and affirming the action, rulings and judgment of the Appellate Court of Illinois and the action, rulings and judgment of the Superior Court of Cook County herein, the State of Illinois has, in effect, since the said Edwin L. Brand, purchased and acquired the said property in question, passed or established a law impairing the obligation of the contract of said Edwin L. Brand for the purchase of said property and the contract rights of the plaintiffs in error as owners of said property; all in violation of said "First" paragraph of "§10" of "Article I" of the Constitution of the United States; and therein the Supreme Court of Illinois erred in its said rulings and judgment herein.

Fourth. For that by the action, ruling and judgment of the Supreme Court of Illinois herein, (*a*), in sustaining and affirming and in not reversing the rulings and judgment of the Appellate Court of Illinois; (*b*), in sustaining and affirming and in not reversing or in not directing the reversal of the action, rulings and judgment of the Superior Court of Cook County, in refusing to submit the said case upon the evidence introduced upon the trial thereof to the jury for their determination and verdict, as required by Section 13 of Article 2 of the Constitution of Illinois, and as required by the said Revised Statutes of Illinois, and (*c*), in finding, ruling and adjudging, as matter of law, that upon such evidence the plaintiffs in error were not damaged or entitled to recover any compensation, and (*d*) in entering judgment in favor of said defendants and against the plaintiffs herein, the plaintiffs in error were, by the State of Illinois, deprived of their prop-

erty without due process of law; all in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and therein the Supreme Court of Illinois erred in its said rulings and judgment.

Fifth. For that in and by the rulings and judgment of said Supreme Court of Illinois in said specification "*Fourth*" above mentioned, the State of Illinois has denied to the plaintiffs in error the equal protection of laws of said state, in violation of Section 1 of said Fourteenth Amendment; and in and for that the Supreme Court of Illinois erred in its said rulings and judgment.

A printed motion to dismiss or affirm has been made by defendants in error, and by stipulation reserved to be pressed upon the argument.

We submit the following

Chronology:

1870—Present Constitution of Illinois adopted.

1872—Eminent Domain statute in question passed.

1889—Brand purchased the property in question.

1894—Stickney case opinion rendered (150 Ill. 362).

1895—Ordinance passed for construction (on Wabash avenue) of the Loop Railroad.

1897—Loop Railroad actually constructed (put in operation October 3d).

1900—Brand deceased.

1902—Present action begun.

1903—The test case of *Aldis* v. *Union Elevated R. R. Co., etc.*, decided in the Illinois Supreme Court, sustaining the legal right of abutters to sue, and if damaged, recover.

1909—Case at bar tried in Superior Court Cook County.

1913—Case at bar decided in Supreme Court of Illinois.

SUGGESTIONS.

As to the Motion of Defendants in Error to Dismiss or Affirm.

A somewhat naïve position is taken in the brief of defendants in error on their motion to dismiss (point I, pp. 33 and 36 to 47), as to the effect of the waiver by plaintiff of certain assignments of error or points in argument mentioned *supra*. That claim is, that there is no evidence in the case from which "market benefit" to the property from the improvement as a whole, or from the travel facilities furnished by the improvement *can* be inferred.

The record is full of evidence that defendants here *claimed* that there was such benefit (P. R. 29, 31, 32) (and under the rule forbidding "inconsistent positions" in court they are estopped from here contending that there *could not* be); the trial court held in effect that there was, or its holding of necessity implied that there was; and for the purpose of this case plaintiffs in the upper court in effect conceded and here concede again that there was; and in addition they claim that it will be presumed that there was at least *some* benefit (though indirect) from such source—which they are privileged to concede for the purposes of the case was *sufficient* to offset *direct* damage.

1. Plaintiffs proved loss of value in the premises accruing after the work had been constructed from a loss in rents—*i. e.*, a fact from which *alone* the jury certainly *might infer* loss in value.

2. Plaintiffs proved also *actual physical interfer-*

ence with the *use* of the premises—from which the jury not only could but *must* have inferred damage *whether* the premises had actually decreased in value after the work had been constructed *or not.*

3. Plaintiffs then say that, there being ample and convincing and *uncontradicted* evidence of *damage,* even *if* it were held on the evidence presented that the premises were worth as much "after" as "before" this would not prove "no damage"—since other market elements or influences (as better business conditions, increase in population, increase of other transit conveniences or lines, etc.) might have added value to the holding and fully accounted for no decrease in value.

4. But plaintiffs go still further and say that *even if* the property were worth as much *with* the entire improvement established *as without it, this would not prove "no damage"—because* there *might* have been market benefit accruing to the lot from the improvement as a whole—*i. e.,* from "the facilities furnished by the improvement"; and that this *might* have *offset* fully the damage. (Although plaintiffs claim at the same time as matter of law that such benefits are indirect and are "not capable of approximate estimation" by any human mind.)

5. Plaintiffs, then, for the purposes of the case, concede this latter—this offset—*as a fact* against themselves, reserving only the point of law *and* their constitutional claims thereunder.

In this state of the case, counsel makes an argument, which we find hard to follow. (We are not relying on the *excluded* evidence as to this waiver and see no pertinency in the suggestions made in respect thereto.)

Now this waiver in argument by plaintiffs in error is either effectual or it is not.

If *not* effectual, the record stands here upon the *full* assignments of error.

It is *no more than an offer to waive* the case *if* local or public market benefit is not to be excluded as a principle of law, *i. e.*, if plaintiffs have no right to have it excluded as an offset to or deduction from the *direct damages*—which latter *were* clearly proved.

If, as counsel contends, there is nothing in the record upon which the waiver can operate, then it is the *waiver* and not the case that fails; and the case then stands on its full original merits for review, viz., as a case of *proven damages taken from the jury*, a clear denial of "due process." For it is not the *damage* that is waived or attempted to be waived but the *offset*, and this upon condition that both legal *and* constitutional rights shall be preserved.

Upon the waiver being made plaintiff's attitude is left thus: As still claiming the damages *even though* there were or could be fully offsetting general benefits. If they be *not allowed to make the concession*, or if the court *rejects* the concession, how does that rob plaintiff of his claim to damages *clearly proven?*

To say that there *can be* no offset is to admit the damage proven, or, the same thing, to leave the evidence of damage unaffected as well as the *claim* to damages unaffected.

We can see no inconsistency in counsel or litigant claiming, 1st, that the record *does not prove* a fact, and 2nd, *if* it does—or *conceding the fact*—the *law*

on the merits is still with him, and then making a waiver of the first point, and resting his case on the second,—a principle specifically *involved in the controversy* and essentially *germane* to it.

This is directly in the interest of a lessening of litigation. The Superior Court *decided* this point on fact and law (the issue of benefits) by holding that there was no evidence of *damage*, thus denying a trial on the merits, and also by denying the motion for a new trial; the Appellate Court of Illinois treated this point as *specifically* involved in and *as presented to it by the record*, and *turned the case* upon the point and nothing else; and the Supreme Court of Illinois did likewise. And the Federal attack upon the ruling or decision was made in *each* of the three courts and specifically preserved all the way through.

We apprehend that at the close of plaintiffs' case, defendants could have stipulated to confess error or to confess damages *if* this point of law were held against them; and that in the same forum plaintiffs could have waived or confessed "no damages" upon the same basis. And that in the upper courts in each instance—the *entire cause* being transferred to them by appeal, i. e., the appeal being a *continuation* of the same or original case—similar stipulations as to vital points or vital merits involved in the controversy could be made. And the making of them by the parties are in the interest of ending their *specific controversy* and should not be penalized by a compulsion to prolong it or to retry it.

In writs of error to state courts, this court as a condition to review only needs to be formally assured, (1), that the "Federal" grounds were prop-

erly raised and asserted in the state courts; (2), that the "final" state court either *a*, directly passed upon the issue, or *b*, that the judgment against the plaintiff in error could not have been entered without denying this constitutional claim.

Counsel claim that there is here no evidence of market *benefit* to the property in the case.

The answer is, there *is* evidence of *physical damage* from the *physical structure* and its *operation in front of the property and within the block on which the lot abuts—over and within which the lot has easements.*

The structure is *per se* a change in street *construction* if not in street use, and a damage for which the constitution requires compensation to be made.

Aldis v. *Union etc. R. R. Co., supra.*

> "The thing would be a nuisance if there were no authority of law for its construction and operation."
>
> Cartwright, J., in his dissent in this case (P. R. 135).

Plaintiffs' withdrawal of certain issues in argument, as just said, admits for the purpose of this case that with the road established, there *might* have occurred an instantaneous market effect upon the property resulting from public *travel facilities* furnished by the road in its *entirety*, which equals or exceeds the damage. They then claim as a principle of law *yet involved* in the case that these benefits cannot be applied to compensate or reduce such damages, and that they can recover, and are hence entitled to a trial on this narrower basis of fact.

It does not help counsel's case to argue to defeat this claim that no market benefit *can* be inferred from the establishment of this local railroad; for this, we repeat, is an admission *of damage,* since the latter is an *obvious result* from proven facts. And *pro tanto* we can save counsel from themselves by denying their denial; for it is this very benefit which is usually *expected* to accrue to the community which is "*one* of the bases of the right to grant" *a franchise* for the construction of such a work. (Although, as per cases and argument below, the amount of such benefits either instantly accruing or those gradually accumulating is not capable of definite approximation in estimate—because it is always and of necessity "fused" with other market-affecting and ever-changing elements.)

Upon the concession being made in the Appellate Court that court had its election to either ignore it and reverse the case on the evidence of damage and the full assignments of error, *or* to decide the legal "benefits" issue so specially reserved and argued. If the former, it could have reversed the judgment without adjudicating the point; but it could not have *affirmed* without adjudicating it—and denying it.

The other points raised in the brief on the motion to dismiss or affirm are involved in the merits argued below.

A BRIEF OF THE ARGUMENT.

PART I.

A FOREWORD.

Notwithstanding the former wide divergence of judicial opinion in eminent domain cases as to "general" and "special" benefits, the whole matter primarily is one of substantive law and of universal application throughout the states. For, all of the constitutional provisions under this head, while differently phrased aim at securing merely "just compensation" for "property taken for public use." Our efforts should be towards closing up this margin of difference and establishing a uniform system symmetrically just.

It is frequently said that there is a denial of due process, or an infringement of contract rights, when a state court has attempted to reverse its settled rulings upon a state statute or clause of constitution covering property rights as against one who purchased upon the faith of the initial or prior construction.

We think and are free to admit the *further* condition that—*ordinarily* at least in matters of general substantive law—such prior construction must be found *right and just;* and the later one the reverse. We here aver that *all Illinois decisions rendered after the passage of the* 1872 *act down to the time of the Stickney case ruling* (in 1894), *were not only definitely and specifically and uniformly in favor of the plaintiff's claim here made* (as well as in consonance

with the *plain letter* of this controlling statute), but also *with substantive justice;* and in proof of the latter we submit a few leading and fully reasoned recent authorities below under Point III. There has been, however, so much confusion of terms, etc., upon this particular branch of eminent domain law that we cannot forbear to contribute the propositions scheduled under Points VIII and IX, *infra,* which, after an exhaustive study of the subject, and a review of the decisions of the various states, seem to us to be clearly unchallengable and which also seem to us to be now established as *elemental.*

We submit at this point, however, the following as a sound proposition of substantive law fully proven *infra,* and here stated simply to be kept clearly in mind while considering Part I hereof and particularly the two most vital points, viz., Points I and II.

General market benefit common to a neighborhood or district specially served by a public work cannot be offset to or deducted from the direct, proximate and physical damage to a lot accruing from that portion of the structure erected in an adjoining street, i. e., within that portion of the street in or over which the lot has easements.

In other words, in assessing damages to a lot caused by the erection of a public work, the inquiry is held down to the physical scope of lot—and—easements, i. e., the scope of direct effect upon the actual use of lot and easements.

In other words, as will be found below, the Illi-

nois statute simply called for what has now long been established as the true rule in assessing damages in abutters' cases, viz.:

(1) Take the value of the property as it existed immediately before or without the public structure. (2) Consider how that *structure as operated* immediately in front of the property and *within the zone of easement rights* will *actually interfere with* the *use and enjoyment* of the lot. Then (3) estimate the damage to the market value *caused by such interference*, that is, from the *fact* that its actual use *will always be* so interfered with. (As per texts and cases cited *infra*.)

This includes, of course, the exclusion of all market benefit that might come to the property through the general aid to prosperity of the *people* or to the *business* of the neighborhood or district by reason of facilities furnished by the improvement in *its entirety;* and hence the estimate is to be made as if *means of access* to such facilities (as in case of a railroad depot), were too far away to furnish any appreciable convenience to the premises *or neighborhood* in question—the physical nuisance suffered remaining the same.

The scope of inquiry is frequently referred to as the "physical scope," or the scope of "actual use" or of "direct and physical effects," *i. e.*, those effects which will be suffered (if damaging) or enjoyed (if beneficial) while one is *in the actual use* of his premises.

The general course of decisions in Illinois on the constitutional clause of just compensation is re-

viewed at length by Mr. Justice Mulkey, (a judge of great acumen) in the case of *Rigney* v. *City of Chicago*, 102 Ill. 64, cited *supra*.

The earlier constitution of Illinois (1848) had provided only for just compensation where "property" had been "taken" for public use, etc.

Mr. Justice Mulkey points out the error of the earlier rulings upon this clause in not recognizing that if the *right of dominion* over premises (including of course its appurtenant easements) had been physically *interfered with*, in such case the "property" of the owner—to the extent of this actual interference—had been "taken" in a constitutional sense; that such an interference *was* a direct and "physical" one; and that therefore under a proper construction it would *never have been necessary* to add to the Illinois constitution of 1870 the words *"or damaged."*

The early rulings of Illinois had been to the effect that where the tract or lot *proper* had either been partly or wholly physically appropriated, *or* its use physically affected by works established outside of *the lot proper*—whether on abutting streets or anywhere else—by means of which *the lot proper* was caused to be overflowed, or cinders and dirt and dust were constantly cast upon it, or extraordinary vibrations were given to buildings or improvements upon it, etc., etc., in such case there was "a physical interference" with the lot, that is, with its use, and "property" was in such cases "taken."

But they *denied* the right of recovery to an abutter where the nuisance, whatever it was, was confined to the public street in front of the lot and did not affect

one in the *actual use* of—i. e., *when he was upon the lot proper*. The new constitution changed this, and allowed damages for impeding of *access*, and other like effects, etc.

This able and luminous *Rigney* case opinion, has become a landmark in the law of Illinois and of the country at large.

I.

The statute in question.

1. It excludes all estimates offset or deduction on account of *any* benefit whatsoever. For,

"No benefits or advantages * * * *shall be* set off or deducted * * * in any case."

Could the prohibition have been made more sweeping in terms?

2. In fact the language has even to be strained to a definite extent to allow *some special* benefits occurring *immediately* from the construction of the work to be offset or deducted, as for instance, special benefits from street access or switch track access in states where the same accrues as matter of law upon the establishment of a railroad, etc. (There are some states, or at least one, in which a denial of even such special and direct effects is the established rule. Lewis, Sec. 688.)

While to allow market benefit from the improvement as a whole or in its entirety whether we call it "local" or "general" benefit is to doubly violate the plain terms of the statute.

Hence, we say with the Supreme Court of Illinois

(*R. R.* v. *Henry*, 79 Ill. 290), that as to the exclusion of *such* benefit, "*the statute is too plain to bear construction.*"

3. Hence, we say that *if the case of plaintiffs in error rested upon the* STATUTE ALONE, and there had been no prior state court construction of the same, the appeal to this court from the judgment rendered here would be well based. For, it would be an appeal from an *arbitrary denial of a right based upon a statute too plain to bear construction*—too plain for any reasonable difference of opinion.

II.

The Illinois courts uniformly and consistently for a period of over twenty-two years construed this statute as called for by its plain terms. Such was the settled rule when Mr. Brand purchased the premises in question in 1889.

Preliminary to listing the cases supporting this claim, we submit the following:

Note 1. Bearing in mind the elemental rule that the real purport of a decision is to be tested by the *facts* and *conclusions thereof*, we aver: That not one case will be found in the long list below that attempts to violate the plain letter of the statute in question, with this sole exception: That in the first case—*Page* v. *R. R.*—the depot or "crossing" *located upon* the portion of the premises *actually taken, i. e., within* the scope of private rights, was carelessly treated as a direct "physical" and special benefit—a ruling

denied in the later Illinois cases, (and also by general texts, Lewis § 703, p. 1218), and an element not involved in the case at bar in any event.

Note 2. That, there being a number of cases where the statute is most specifically defined (if such be possible in view of its plain self-defining terms), wherever in the reviewing cases language or terms have been used here and there capable of being used in two senses, it will of course be presumed that the same were used in the sense which is *in accordance* with the plain statute, and within the delimitations of the chief rulings.

Note 3. In the railroad cases (like this one) listed below (with the exception of the first or Page case noted above) there is *scarcely a sentence* in reference to benefits or damages that is capable of two meanings, or that needs to be explained by even a reference to the facts involved. While in the municipal or local improvement cases the *entire improvement,* (or the part considered), was *local to the premises or to the particular block in or over which the property affected had rights and easements;* and hence expressions in several of these to the effect that "the whole and not the partial effect" should be considered, that "the improvement should be considered as a whole," etc., are explained at the same time by the court *expressly limiting* its inquiry to *"physical effect," "special benefits not common to other property,"* and by the court *expressly excluding* "neighborhood" or "district" effect, etc., which naturally must be excluded because *incapable of inclusion, i. e.,* of approximate estimation.

(If there were the slightest doubt as to this latter

issue, as affecting the "municipal" cases, it would be removed by *Chicago* v. *Mecartney*, 216 Ill. 377, where it was held that in such a "taking" or "damaging" "neighborhood benefits" *were of necessity excluded* and reserved *for future special assessment* in supplementary proceedings to collect for the cost of the work.)

In other words, a thorough consideration of this entire line of cases will reveal as uniform and consistent a doctrine or construction as it is easy to imagine or to find in the realm of reported decisions —a situation which was inevitable from the fact that there was an existing statute "TOO PLAIN TO BEAR *construction". While the first attempt (the Stickney case) to violate the statute has just as inevitably resulted in a pure confusion and contradiction; and all the later cases either simply repeat such contradiction* OR EXPRESSLY REAFFIRM *the plain terms of the statute, and the ante-Stickney rulings thereon.*

Note 4. In examining these cases the court must bear in mind that in Illinois the "two item" method of estimating compensation where part of a lot is taken, is—at least generally—in vogue, viz.: One allowance for the *value* of the "part taken" and one for "damages to the remainder," treating the remainder as "property not taken but damaged." Abutting property damaged—*i. e.*, where no part of the lot proper is taken—is also placed in the class of "property not taken but damaged," and the inquiry in such cases is governed by the same rules as that in respect to "damages to the remainder."

Note 5. In the following list of cases—where for convenience we number each and give the year of de-

cision—those in italics are railroad cases, as the one at bar; those in Roman (set in from margin) are cases where a *local* municipal improvement was involved, *i. e.*, of a class where a local or "special" assessment could have been, and sometimes was later levied for the cost of the improvement.

Note 6. We refer particularly to Nos. 2 (Henry), 4 (Rigney), 5 (Kirby), of the earlier cases, and No. 15 (Aldrich) of the later, as construing, defining and even *illustrating* the statute, beyond any chance for doubt; and none of the intervening cases will be found in conflict.

No.	Year.		Vol.	Page
1	1873	*Page* v. *R. R.*	70	324
2	1875	*Keithsburg etc. R. R.* v. *Henry*	79	290
3	1877	Hyde Park *vs.* Dunham	85	569
4	1882	Rigney *vs.* City of Chicago	102	64
5	1882	*St. L., etc., R. R.* v. *Kirby*	104	345

(Commented upon *supra,* and see special analysis of this and two other cases referred to in the 70th Ill., *infra,* Point X.)

This case was the first full and deliberate construction of the statute. And it was held that the statute was too plain to need or "bear" construction (293).

Held that "*special benefits* to the property not taken" should be considered, viz.: *direct access* given the "remainder" by widening the abutting street. But general *neighborhood* effect caused by the street opening was *expressly* excluded (p. 570.)

Where a learned review of the historic struggle over the term "property" is given; and where it is held that the *scope of inquiry* in these abutters' cases is whether or not there has been a "*direct physical obstruction or injury to the right of user or enjoyment*"—a "physical" scope. (One of the leading eminent domain cases in the country.)

Where the ruling in the Henry and Rigney cases was further emphasized in the most specific manner possible, and where the jury were told to consider the railroad "*as running through this farm* • • • *and no further,*"—*which of necessity excludes all market facilities,* and where the jury were told that they "*should not consider*" the same. (p. 348.)

No.	Year.		Vol.	Page
6	1883	*McReynolds* v. *R. R.*	106	152
7	1885	*Dupuis* v. *R. R.*	115	97
8	1886	*Chic., etc., R. R.* v. *Blake*	116	163
9	1886	Hyde Park *vs.* Washington Ice Co.	117	233
10	1887	*Concordia Cemetery Assn.*, v. *R. R.*	121	199

Where the land owner claimed that Sec. 9 forbade the allowance of even "*special* benefits," and the railroad counsel *defended* their allowance; both sides quoting the Henry case. The court, of course allowed them. (p. 158.)

A petition to condemn city lots for right of way and depot purposes where it was held that the measure of damages the difference between value of the "remainder" "before and after the *construction* of the road." No issue was made as to market facilities, and no indication of any departure from the statute or from prior rulings.

Syl. 4, p. 169: "*No* benefits • • • to the lands or property • • • *in common with all other property along the line of the proposed railroad can be set off or deducted.*" The court also held that the original Page case, *supra,* is in substantial accordance with this ruling.

Syl. 2, Opinion p. 236: Damages are to be determined "with reference to the *special benefits only* to the property not taken." "Common" and "neighborhood" benefit "is *not* to be taken into consideration." Page case cited and construed as in accordance with this rule.

Syl. 3, 5: Local market benefit allowed the land owner by allowing him the value "*as enhanced by prospective benefits to result from the construction of the road,*" and then considering damages to this *enhanced value.* (p. 205 Opinion.)

No.	Year.		Vol.	Page
11	1887	*Chic., etc., R. R.* v. *Bowman*	122	595
12	1888	*Kiernan* v. *R. R.*	123	188
13	1888	Harwood *vs.* Bloomington	124	48
14	1888	*Wabash, etc., R. R.* v. *McDougall*	126	111
15	1890	*Chicago, etc., R. R.* v. *Aldrich*	134	9

(Same as Kirby, *supra*,—the question was held to involve the effect of "the railroad *constructed through the farm.*" And all but "actual and *appreciable* injuries" excluded. Syl. 6, Opinion p. 601.)

The test of damages is the "decrease in market value by reason of the construction and operation of the *railroad.*" (p. 194.) No issue made on the subject of "market facilities"; and no attempt to reverse or modify prior rulings.

Which held that Sec. 9 in 1872 Act applied to a taking for municipal improvements. "Special benefits" only allowed and defined to be "*benefits not common to other property.*" (p. 50.)

Railroad first constructed upon an embankment or "fill" across the farm. Plan of construction three years later changed to *trestle.* Damages assessed for the first taking on embankment plan and a *reassessment* made for the later change to trestle, causing new damage. *Physical effect scope* clearly held.

Reaffirmed Kirby case, *supra*, as to portion of R. R. limited to farm. See full reasoning, p. 16, *et seq.*

If there were any item of doubt hanging over or about the theretofore specific and clearly defined attitude of the Illinois Supreme Court as to the exclusion or inclusion, of "market facilities," etc., all vestige of it would have been removed by this opinion.

No.	Year.		Vol.	Page
16	1891	Springer *vs.* Chicago	135	552
17	1893	Washington Ice Co. *vs.* Chicago	147	327

The "whole improvement" was a strictly local improvement, or one opening up *a cul de sac* directly east of the property and giving a new *direct* egress from the property by means of bridge, viaduct and approach. Held to be "*one* improvement"; and that in determining physical effect, that is, an access-giving effect, the approach to viaduct and bridge should not be separated from the latter. A *direct or physical effect scope* involved.

Special benefits *again* defined as "benefits *not common to other property;*" and held that neighborhood effect from opening by the street so as to give *a neighborhood market effect* "for factories" etc., must be excluded on the authority of the "physical effects" case of McDougall, just cited.

Several of these cases are more fully analyzed *infra*, Point X. The Supreme Court of Illinois first departed from the plain text of these cases in the case of *Metropolitan R. R. Co.* v. *Stickney*, 150 Ill. 362, decided in June, 1894, where as shown *infra* it attempted to reverse—and at the same time affirmed—the rule announced.

Note 7. In the two years intervening the adoption of the Constitution (1870) and the passage of the Act of 1872, a number of "damage" cases arose, —*i. e.*, cases based alone upon the "just compensation" clause, affecting property "*damaged.*" A number of these reached the State Supreme Court and were decided several years after the adoption of the 1872 Act, and after several decisions had been made construing the same.

These "constitutional" cases would not be important here even if they had been *in conflict* with the later statute and the construction given to it; but as a matter of fact they are in harmony with it, and they are cited years later interchangeably with the Henry and other cases arising under the statute.

Detailed references to such cases based upon the constitution alone are here omitted, since the statute is sufficient, and is of course more explicit than the general constitutional clause; and there are so many rulings under the statute that it would simply be "carrying coals to Newcastle" to dwell on these few others at length. They are listed, however, with sentence references, in the argument, *infra*, under Point X, after the analysis of the "statutory" cases.

III.

The whole trend of authority in substantive law and of legislation is to support the rule of this plain statute.

As to the general state of the law, we also show

(1) That "the weight of authority is clearly against" the Stickney case ruling.

Lewis Em. Dom., 3rd Ed., 1909, Sec. 702, p. 1216; and

Beveridge v. *Lewis,* 137 Calif. 619 (623).

Mantonville R. R. v. *Slingerland,* 101 Minn. 488.

"The whole trend of authority is against it."

Kimball v. *Salt Lake City,* 90 Pac. Rep. 398.

Elliott, Roads & Streets, 3d Ed., Vol. 1, §277.

And the many selected cases listed *infra,* Points VIII and IX.

(2) That *all* the *state constitutions,* seven in number, which expressly mention the subject of benefits *exclude these local benefits*—in somewhat narrower language than that of our Section 9, and certainly in *no broader* terms, viz.: they provide for compensation "irrespective of any benefit from *the improvement.*"

Alabama, Art. 13, §57.

Arkansas, Art. 5, §48.

California, Art. 1, §14.

Iowa, Art. 1, §18.

Kansas, Art. 12, §14.

Ohio, Art. 1, §19, Bill of Rights.
Ohio, Art. 13, §5.
Washington, Art. 1, §16.

(3) That *all* state *statutes*—with the possible exception of one or two passed many years ago in the days of railroad domination—*expressly exclude* these local benefits.

(4) That the same rule was permanently settled in England nearly a half century ago, and never *even questioned* since, so far as we can find.

Eagle v. *Charing Cross Ry. Co.*, L. R. 2, C. P. 638. (Although in England the courts make or formerly made the distinction in favor of the "municipal" damaging referred to in the Sauer case in 206 U. S. 536. But the whole current of judicial opinion is "sweeping away" the last vestige of this narrow rule. Elliott, 3d Ed., §284.)

IV.

The Stickney case ruling.

(150 Ill. 362.)

In this case the court for the first time, under the constitution of 1870, tried to hold that *any* market benefit accruing from the whole improvement was "a special" benefit, at the same time holding distinctly (Syl. 5, opinion, p. 371) that these *very same benefits* (arising from the facilities furnished by the improvement) "*are incapable of estimation and speculative* • • • *and are not to be considered.*"

We here submit:

(1) That the logic and reasoning of the Stickney opinion is *fallacious* and *contradictory* to the last degree.

(2) That it ignores the now *common* and long established classification of *market* benefits and damages, etc.

There are in fact *three* classes of *effects*—*i. e.*, considering both *market and personal* effects—which flow from the establishment of a public work, viz.:

(1st) "*Direct, proximate and physical*" *market* effect involved in the question of a damaging *vel non.*

(2nd) A *market* effect arising *not* from any physical invasion of the *use* of the lot proper or of its easements, but arising from the *improvement as a whole.* And

(3rd) A *general effect*—usually beneficial—accruing to the *entire* public or community at large, the *people generally,* by reason of the *aid to prosperity or business in general, i. e.,* an effect arising from the *establishment* of such work or convenience for the public use, etc., and interwoven with general business and social conditions. (It is *through* this that the 2d class comes.)

(3) That Mr. Justice Shope made a *two*-class division of *all* benefits (*market* or *otherwise*) and thus plainly confused and re-confused the *first with the second and the third with the second.* (No petition for re-hearing is reported as having been filed.)

(4) That Sec. 9 of the Eminent Domain Act—the *very section involved, was apparently not mentioned in the briefs of the parties in the Stickney case, and* though *mentioned* (very incidentally) in the opinion, was *not, however, construed in the opinion.* Somehow or other the parties, and the court,

apparently, did not realize that Section 9 was the very thing involved.

(5) He then caps the climax by his distinct holding in syllabus 5 (page 371), **expressly excluding all effect from market facilities,** a thing repeated in the very *last* case cited in the majority opinion here (Everett case, 225 Ill. 529), where the court *expressly* said (and the majority opinion here *quotes and approves* the same!) that *"benefits such as* **increased facilities for travel"** * * * *are* NOT *to be taken into account."*

The court thus contradicts bodily the prior conclusion in the opinion that any market benefit is a "special" one.

For such are the only benefits outside of physical effects which could have arisen from the work and benefited the property in question. Could the court have mentioned any other?

The holding in the Stickney Case to the effect that the *Henry Case* (79 Ill. 290) *was the only one in conflict with its conclusion, lately repeated by adoption in the majority opinion here, is startlingly inaccurate and is poignant with injustice to the court itself.*

In all candor and with all due respect to the court, **the exact contrary is strictly true,** *viz., that there is* **not one case** *prior to the Stickney ruling arising under the* 1872 *act which supports such conclusion;* and that the holding in the dissenting opinion of Mr. Justice Cartwright, in substance to this effect is accurate.

With a false concept in mind mentioned elsewhere

and thus confusing two distinct *classes* of *blended* market effects, etc., all decisions reviewed by Mr. Justice Shope, in the Stickney case, are made to bend to this false concept.

The result is, as shown by the detailed analysis, *supra:*

That the opinion—and its syllabi which accurately follow it—fairly reek with fallacies upon their face, and at almost every turn; and case after case *squarely supporting* the Henry case both in *language and conclusion* is distinguished or waived aside upon the ground that the court did not *"mean"* what it said or concluded—*when what is said* **and** *concluded was* **clearly right** *and clearly in accordance with a* **plain statute,** *and, as the Illinois court does not deny,* **clearly just!**

That the learned justice did not realize that in the several cases where the court used the expression "the difference in value of the property *before and after* the construction of the *railroad,"* or *"without the railroad and with it,"* **it professedly and properly was dealing with the physical structure at the particular spot or locality, and within the limits of its "direct, proximate and physical" effect—and not with the "improvement" in its entirety, or the enterprise itself; and the term "the railroad" meant only the portion thereof which physically affected the premises in question.**

This leaves the Stickney case devoid of support from a single prior case squarely posited on its facts and conclusions; and in view of the facts involved, it even leaves practically no supporting language.

THE STICKNEY CASE REASONING.

In order to properly analyze the reasoning of this case we need only take the various planks of the syllabus for analysis; for the language of these are taken almost bodily from the opinion.

Syl. Nos. 1 and 2 (p. 370 of opinion):

In this the court simply lays down the rule for *local assessment* cases—in Illinois frequently called *"special"* assessment—and an incorrect rule at that. For a lot is *not* to be assessed for (*all*) *the* "special benefits"—but only for its *due proportion of cost* of the work:

No. 2:

The instruction which is quoted herein, we submit, is correct.

3. *"If a piece of property is enhanced in value, its enhancement—or, in other words, benefits to the property—cannot be said to be common to any other* PIECE *of property* SPECIALLY *enhanced in value, and it is thus* SPECIALLY *benefited* WITHIN ITSELF, *and* IRRESPECTIVE *of the benefit that may be conferred by the* IMPROVEMENT *upon other properties."* (P. 370.)

It is hard to get anything of value out of this.

It is just as easy to say that *each citizen* benefited in his business by the establishment of a public facility is benefited *within himself."* But how to *estimate* that benefit or *whether* it can be estimated in dollars and cents is a different proposition.

No. 4 (p. 370-1):

Here the court tries to make *two* classes of benefits out of *three classes.*

5. *"So a railroad built through a town or through the country may be a* GENERAL *benefit by* AFFORDING ADDITIONAL FACILITIES *for travel and commerce, and thereby be of benefit to the community at large;* BUT THE EFFECT *of such general benefits* UPON ANY PARTICULAR PIECE OF PROPERTY WOULD BE IMPOSSIBLE OF ASCERTAINMENT AND SPECULATIVE, *and it has always been held that such benefits* ARE NOT TO BE CONSIDERED FOR THAT REASON." (P. 371 of Opinion.)

This flatly contradicts the prior conclusion and furnishes one of the cardinal proofs of its error!

It is practically all that plaintiffs here have claimed!

For, what benefit or beneficial effect can come to this property here *or* to the entire surrounding neighborhood *except "travel"* or *"commerce" facilities?*

And if the full market effect therefrom is *"impossible of ascertainment* and speculative," how are you going to tell how much to offset to the item of *"physical damage"* which, as every one must concede, *is* capable *of* measurement, *i. e.*, of estimate or computation?

Nos. 6 to 12 embody the fallacy of assuming damages as a direct effect and then jumping beyond "physical scope" to inquire for offsetting *benefits*—which the opinion has just said can *not* be estimated.

Nos. 13, 14 and 15 are all fair statements of the law when held down to a *"physical effect"* rule or scope.

V.

Cases Subsequent to the Stickney Case.

Said ruling, being squarely contradictory on its face, has not been followed in later decisions.

Later cases therefore either simply follow its contradictions or expressly reaffirm the prior law and the plainly worded statute.

The said opinion attempts to reason into the case a foreign element—and then finally *expressly excludes* the consideration of such element.

It is evidently for this reason that Mr. Justice Cartwright construes it as well as the subsequent cases—some of which do no more than follow its confusions and contradictions and others squarely *deny* its attempted conclusions—as not disturbing the even tenor of the prior fully imbedded decision law and as "necessarily implying a consideration (only) of *legitimate elements* of damage and benefit and a conclusion therefrom."

Outside of one or two cases submitted with the Stickney case and disposed of later in formal *per curiam* opinions there are only a very few which attempt to follow it; and in such attempts as said they of necessity *follow a hopeless contradiction.* So that, wherever the Stickney case is referred to, expressions will also be found in the same opinion that *only "physical effect"* is to be considered, and right along with the Stickney case are cited prior rulings which *involved only physical effects* and *limited* benefits to the same scope. So that such cases can be either classified as *self-contradictory* or "confusing" or as

cases *reaffirming* the statute and the Henry case construction of it.

We do not analyze these cases at great length, since they are not vital here. But we note the following:

(1) That the Illinois "local improvement act" of 1897 (passed while the "loop" road was in process of construction), affecting municipal improvements (which the court had held in *Harwood* v. *Bloomington,* 124 Ill. 48 (50), *supra,* were governed by Sec. 9, in prescribing the "taking" or "damaging") expressly *excludes* local benefit or effect in fixing "compensation;" for it *reserves such for special assessment.* This is a strong *statutory construction* of a *plain* statute. (Sec. 521 of Chap. 24, "Cities, Villages and Towns," Rev. Stat. Ill. 1912, p. 408.)

It is there enacted:

"The Commissioners * * * having found the said amounts "(*i. e., a,* the amount of the cost of the work, including the items allowed for *property damaged,* and *b,* the amount to be specially, that is locally, assessed) "shall further report what lots, blocks, tracts and parcels of land will be *specially benefited* by the said improvement * * * and shall apportion and assess the amounts so found to be of benefit to the property" (*i. e.,* the aggregate assessment in the *district* found specially benefited) "upon the several lots, blocks, tracts and parcels of land in the proportion in which they will be *severally benefited* by said improvement," etc.

(2) We also in addition here point out:

(a) How the state court ruled that for gen-

eral neighborhood, *i. e.*, "*local*" damage, a property owner could not recover. That such damage was "*not special*" to the property. (As, for instance, that caused by a railroad running through a residence district which, or the plan of construction of which, did not touch the *physical* scope of lot—and—easement. Though nearby property might suffer most from a neighborhood nuisance, held, "such damage was only *a difference in degree*" (from that suffered by others), "and not *in kind.*"

Aldrich v. *Met. Railway Co.* (the latter one of these very defendants in error here), 195 Ill. 456 (syl. 1).

I. C. R. R. v. *Trustees of Schools*, 212 Ill. 406.

(b) And that by two *express* rulings they held that the "*diversion of traffic*" from the neighborhood was no element of damage in abutters' cases.

Chicago v. *Spoor*, 190 Ill. 340.

Chicago v. *Jackson*, 196 Ill. 496.

And hence that *increase* of such traffic *could* not be an element of *benefit*.

(c) That in *Chicago* v. *Mecartney*, 216 Ill. 377, (cause of action arising in 1893), as properly analyzed, the state court had held that in determining the question of a damaging *vel non*, assessment benefits, *i. e.*, net *neighborhood* effect *could not* be offset to *physical* damage or effect.

This statute here construed was the same one involved in *Harwood* v. *Bloomington*, 124 Ill., *supra*, p. 65.

(3) Note also the following:

R. R. v. *Borms*, 219 Ill. 179:

"The court instructed the jury that in esti-

mating the damages to appellee's land not taken they were *not* to consider such general benefits, if any, *which might be derived from the* construction and operation of the road,—meaning by general benefits, *those which the land would share in common with others in the same vicinity by making a better market or by affording conveniences for trade and travel.* This ruling of the court is assigned as error." *Held, no error.* (181) Citing Stickney Case. (Re-affirming.)

R. R. v. *Vance,* 225 Ill. 270:

This case (referred to in majority opinion) holds that benefits which are *"conjectural and speculative"* should be excluded. The court here cites (p. 273), the *physical effects* cases right along *with* the Stickney case ruling, and fails to note that they are radically different in substance and scope. (Confusing.)

R. R. v. *Everett,* 225 Ill. 529:

A *coal lands* case, where the switch or other connections to market the coal were not only a local, but held to be a special benefit. Such cases some courts place in a class by themselves, as Mr. Justice CARTWRIGHT says. But in this case the court says that *"benefits affecting the whole community, whether owners of property along the line of railroad or not,* SUCH AS **increased facilities for travel,** etc., **are not** *to be taken into account."*

All of these cases except the Vance case expressly re-affirm the ante-Stickney case rulings and the statute.

VI.

The Illinois Law Prior to Act of 1872.

This while not primarily inportant here, significantly shows that *twice before* property owners' benefits assured by *specific statutes* of Illinois have been unconsciously construed away by her Supreme Court in whole or in part.

In Section 1 of Act of 1833 (Rev. Laws of Ill., 1833, p. 535), it was provided that the assessors "shall assess the damages which they shall believe such owner or owners will sustain over and above the additional value which such land will derive from the *construction* of such road."

In *State* v. *Evans,* 2 Scam. (3d Ill.) 208, the court held that under this statute the "benefit that will result" to the claimant's land "from the *construction* of the road" (*i. e.,* according to the *plan* and *profile,* etc.) "is to be inquired into, and not that which may result from its *location.*" This in effect was an attempt to allow "local" or "neighborhood" market effect, although not clearly defined.

But in *Alton & S. R. R. Co.* v. *Carpenter,* 14 Ill. 190, the court greatly extended the former ruling as to benefits in *State* v. *Evans* more in favor of the railroad.

It was held that "if additional value is given to the land by the construction of the public work, it matters not whether it be by draining the land which was before wet, by *affording additional facilities for taking its produce* to market, or by the general enhancement in the value of the land occasioned by

its contiguity to the public work," etc. (Failing to note the *basal distinction* between these classes of benefits.)

This case was decided in December, 1852, and on page 193 the court expressly refers to the Act of June 22, 1852, which prohibits the offsetting of "common" benefits or advantages, etc.

It was evidently the claim raised by the railroads in this case viz.: that the land owners should be charged with "facilities" benefits, that caused the passage of the 1852 Act. It provided for "the assessment of damages which may result from the construction and operation of the road," etc.

> "*Provided,* the said commissioners shall *not estimate* any benefits or advantages which may accrue to land affected *in common* with those adjoining lands on which such road, canal or other improvements *does not pass.*"
>
> Laws of Ill., 1852, p. 148, Sec. 5.

Plainly this was an effort to prohibit the offsetting of market facilities which were *common* to *the entire neighborhood.* (The very language quoted has long been in common use throughout the country as indicating clearly the dividing line between special and general benefits.) Yet the Supreme Court of Illinois did not so decide.

In the case of *Hayes* v. *R. R.*, 54 Ill. 373, this new 1852 statute was construed to mean that the prohibition of the offset of benefits and advantages *applied only* to the particular "property," that is, *the part* of the land which was *actually appropriated* and that in fixing damages to the remainder the "benefits and advantages from the construction and use of

the road"—including market or "depot" facilities—were *still* to be taken into consideration and estimated.

Thus, first, the unjust rule of charging the land owner with travel or market facilities was erroneously announced in construing a statute which called for the reverse (as per leading authorities, Point III, *supra*). And then after a *second* statute had been passed *expressly* to *prohibit* this in language *still more plain, usual, fit and specific,* the courts had *erred again* and denied its effect, *i. e.,* as to land *"damaged."*

Then the legislature made it *"too plain to bear construction."*

Is another statute needed? How much plainer will the *next* statute be? *How much plainer* CAN *it be?*

VII.

The Majority and Dissenting Opinions of the Illinois Supreme Court in the Case at Bar.

THE MAJORITY OPINION.

The chief and dominant features of this opinion, as we view it, are these:

First. There is no attempt therein to defend the *Stickney Case* ruling upon its *merits,* or to prove that the same embodies *"just* compensation."

Second. The conclusion is based squarely upon the rule of *stare decisis.*

In justification of the said conclusion, the court points,

(1) To three *initial* cases, *Fracis Page and Eberhart* (70 Ill. 324, 238, 347), decied in 1873) referred to *supra,* and analyzed *infra,* point X.

(2) To the *Stickney* case; and

(3) To the last two cases (*Vance* ad *Everett,* 225 Ill. 270 and 579).

It then avers,

(4) That with *"but one exceptio"* (the Henry case, 79 Ill. 290, *supra*), the announced rule has been *"adhered to for forty years."*

(It will be noted that the dissenting opinion takes the position that the *exact opposite* has been the rule for the forty years).

It does *not* seem to accept the *challenge to construction* thrown out by the *plain language* of Section 9, or to deny that such language *inexorably* calls for a reversal of the lower court's judgment.

THE DISSENTING OPINION

After referring to the obvious injustice or unfairness of the rule just referred to, Mr. Justice Cartwright furnishes a long line of Illinois cases in addition to those cited above, which clearly define the *scope of the inquiry in all cases brought for damages occurring from a public use.*

That scope is defined as, and limited to **"direct proximate and physical"** effects upon the *use* of the land *itself* through which its market value is directly and instantly affected.

The rule being based upon a plain statute, and in addition settled by a uniform and totally unconfused

line of cases for 22 years or more, Mr. Justice Cartwright interprets the later cases which re-cite and re-adopt them as following them, which they do in the main. And he finds the whole 40 year or more line of cases uniform by adopting what is sound in the Stickney case opinion and ignoring the confusing and unsound expressions in it and in a few later cases.

He assumes that the language of "before" and "after" and "without" and "with" "implies a consideration of (only) *legitimate elements* of damages and benefits."

We submit that a reviewing opinion which rejects or ignores the confusing and unsound *language* in a few cases as not meant and finding the whole line uniform in substance, is far more accurate and acceptable review than one which assumes to upset the whole 40-year line (with a single exception), or which —with all due deference—seems to look at it "upside down."

PART II.

VIII.

Eminent Domain Elements.

The question of how damages from public works are to be assessed, has caused as much, if not far more, confusion in the law of eminent domain than the historic issue over the term "property taken."

The chief trouble in the matter arose from the courts—in inquiring as to the effect upon the particular lot from "the work" or "the improvement"—not realizing that in these damage cases they were **not concerned** with the **entire** work or improvement, **but only with such portion thereof as had been or was to be constructed within the limits, or scope of the lot and its easements—i. e., with that portion of the work as operated capable of producing a physical effect upon the actual use of the lot.**

This scope—the extreme *territorial limit* of private rights,—is often referred to as the "physical scope" of the property. While courts have differed as to what this scope is, it is now usually considered in case of an ordinary city lot to extend over that portion of abutting street (or alley) necessary to give an outlet to the general system of streets in the neighborhood. Ordinarily—at least in many jurisdictions—the easement of access to such lot cov-

ers only the block upon which the lot abuts or extends to the nearest intersecting street, although a corner lot is often held to have a special interest in a *cul de sac* right opposite. (Lewis, §191.)

1. The term "property" as applied to "real estate" is capable of being used in three different senses:

1st: The physical *land*—which is, strictly speaking, not property, but the *subject* of property.

2nd: The *right of dominion over* the physical land; and

3rd: The *value* of such right of dominion.

It is in the *second* sense that the term is used in constitutional provisions; and the "taking" of property there referred to means simply a *physical interference* for a public use with such *right of dominion or user.* The *extent* to which the *market value of* such right of dominion is diminished *by such physical interference* is the *measure* in money of the taking—and of the recovery.

Rigney v. *Chicago,* 102 Ill. 64 (77-8).
Eaton v. *R. R.,* 51 N. H. 504.

2. The right of dominion over a lot is such a dominion over the lot *and its easements.* These are inseparable; and this right is an entirety—*a unit.*

Lewis Em. Dom., 3rd Ed., §693, p. 1198.

3. The permanent interference with any part of the *subject* of this right or unit of ownership—whether by obstructing a part of the lot proper, or other land or areas in or over which its easements extend—is a *taking* of a part of this "property"—this unit or right of enjoyment.

The process is in effect the comparison of two objects, that is, of the value of the right of dominion over each.

In effect one unit of ownership is destroyed and another unit substituted.

4. The *damage* in such case is a *unit;* and the practice, in cases where a part of the lot proper is appropriated, of dividing such damage into *two* items, viz., into one allowance for "part taken," and one for "damages to the remainder," is illogical, usually impracticable and in any event useless.

Lewis, §693, p. 1197, 8.
Bloomington v. *Miller,* 84 Ill. 621 (623).

This practice largely, if not chiefly, accounts for the division and confusion in opinions upon the question of "general" and "special" benefits.

5. There are *two classes of market effects* on land which usually flow from the establishment of a public improvement, viz.:

The first is that which arises from *direct, proximate* and *physical* interference with the use of a lot and its easements.

The second is that which occurs to the lot in consequence of the *establishment* of the public work in its *entirety, i. e.,* from the establishment of the *enterprise, i. e.,* from the public *facilities* furnished by it *to the community* or neighborhood at large.

The former usually embraces or occurs from that *portion* or the work only which is laid *within the limits or scope of the lot and adjoining land appurtenant to it*—that is *within the scope of private interest.* Occasionally a physical damage may occur

from the particular plan of construction of a portion of the work beyond these limits, as where an embankment or "fill" in the general neighborhood may obstruct a water course and cause the lot to become flooded.

6. The market effect which flows from, or rather occurs *in consequence of*, the establishment of the work in its *entirety*, is no more "direct, proximate and physical" than is a market advance of property in a village or city which accrues in consequence of the location of a factory in the neighborhood, the annexation of territory to a city or village, the purchase of a particular lot by a wealthy citizen for his residence, etc.

7. "Such benefits are *uncertain, incapable of estimation and future.*"

Beveridge v. *Lewis*, 137 Calif. 619 (624).

They are also "indirect and remote," etc.

R. R. Slingerland, 101 Minn. 488.

They are a **growth.** They do not "instantly *and* appreciably" affect the *use* and hence do not *directly* affect the *value* of the land.

8. The advance in market value of property in a district for whose use primarily a public work is established is properly a *"local"* benefit, and *not* a *"special"* benefit—whether the district served be great or small. If the improvement be so local *and* of *such a character* as to permit of a local or "special" assessment, property actually benefited can be assessed—*not* for the *full benefit* received (nor to the full extent of *damages* inflicted), but only—for its due *proportion of cost* of the improvement.

The benefit for which any specific lot or tract can be so assessed, though often called "special," is *not* the special benefit involved in a *taking*. In the latter, all "direct, proximate and physical" effects, both damaging and beneficial, **constitute a blend.** And the *net* **result** as to whether the work may be damaging or not determines *whether* there has been a taking *vel non*.

The confusion of these "benefit" and "damage" terms from time to time, while the eminent domain and local assessment systems were growing up at the same time, is largely responsible for the division of authority upon the main question *supra*.

9. A "special benefit" then as used in eminent domain proceedings arises: (a) where the *net* "direct, proximate and physical" *effect* from the structure as planned and permanently built, is *beneficial* (as a "special damage" arises when such net result is *damaging*). Or (b) it may be also by reason of some specific and special *privilege* or easement *"directly and proximately"* conferred by the work upon abutting property, as giving *access* to a public street, or access to an abutting railroad by means of a switch track privilege (where the right to maintain it is specifically granted, or assured, by state law). Lewis Em. Dom., 3rd Ed., §702, 3.

These latter (b), though capable of being separated *in estimate* from direct physical damage (a), are ordinarily to be considered in connection therewith and as items to be credited to the road as direct or *special* benefits.

10. The true rule of assessing damages where a portion only of the lot is taken, or where its ease-

ments only are interfered with, the rule of ascertaining damage is this:

(1) Estimate the market value of the lot, before improvement, *including,* of course, its easements; (2) consider how the construction and operation will directly and physically *interfere* with its *actual use or enjoyment;* and (3) estimate *the damage to* or reduction of such market value *from such interference, i. e.,* from the *fact* that its use and enjoyment *will always* be so interfered with.

Lewis, § 693, p. 1199.

Louisville & N. R. R. v. *Ingram* (Ky.), 14 S. W. 534.

Lambeth v. *Power Co.,* 152 N. C. 371.

11. Public improvements are made primarily *to fill a need* of a community, district or neighborhood; and one of the functions of government is *to provide for* (and at the *common expense or* for the *common profit*) the growth and development of its communities in the way of authorizing or constructing public works. A system which compels abutting owners or others to suffer physical damage from such works without compensation or deprives them of their share of benefit therein, cannot be just. Hence, (as more fully shown in the next point):

To exclude any one property owner from sharing in the general local benefit is to deny him the "equal protection of the laws."

IX.

The Injustice of the Rule Attacked,

or

The Rights and Equities of the Property owner in the Improvement.

1. As a property holder *of the district* specially served by the public improvement, the owner of *property physically affected has an interest in the improvement.*

2. *To deprive him* of such interest, directly or indirectly, is "to deny him *the equal protection of the laws.*"

> *Beveridge* v. *Lewis,* 137 Cal. 619 (625).
>
> *Mantonville etc. Ry. Co.* v. *Slingerland,* 101 Minn., (p. 490):
>
> "It would be an *unjust discrimination* against this land owner to require him *to pay for the privilege of paying the plaintiff*" (Ry. Co.) "*for the transportation of his freight.*"
>
> *Keithsburg etc. R. R. Co.* v. *Henry,* 79 Ill. 290 (294), *supra.*

(This *constitutional* feature entirely overlooked in nearly all of the earlier cases.)

3. One of the very bases of the *right of the public authorities to grant* to private persons or corporations the *right* of eminent domain *is the prospective benefit in market value to the property in the district to be served.*

> "That the railway property and stock increase in value, and that the community through which the railroad passes finds its lands made more valuable and its property increased *is the*

accomplishment of the very purposes for which the sovereign state conferred these franchises and privileges upon corporations of this class."

Mantonville etc. R. R. Co. v. *Slingerland, supra.*

4. *All* public franchises of this nature are granted *in part by the consent of the abutting property owner,* as well as of others, *idem.*

No such consent of himself or his representatives can be implied upon the basis that he and others in like situation shall be *excluded* from sharing in the enterprise *as* a property owner; or that he and such co-owners are to bear the burden for the benefit of others exclusively by suffering the *physical character* of their premises to be changed and its future possibly affected for all time—without compensation.

5. The discrimination made by offsetting general benefits to the special damage to abutters operates in effect to give the *private* corporation the right to *permanently change the physical character* of the *abutters' premises without paying anything therefor.*

CARTWRIGHT, J., in dissenting opinion here. (P. R. 135.)

6. There is no public interest which demands such a sacrifice upon the part of the abutting owners, and hence it cannot be defended upon the ground of public duty. Jails, hospitals, fire engine houses may indirectly produce market damage. But they belong to *police necessities.* The work here is merely a public *convenience.*

7. Since *neighborhood damage* can not be recovered for (point V, (2), (*a*) *supra*), it follows logically that *neighborhood benefits* should not be charged for.

8. The discrimination against abutters involved in the "inclusion of common benefits" rule has various unhealthy results. Among others, it tends to create unwholesome scrambles among property owners as to where the improvements shall be located and as to who shall bear the burden for the benefit of all.

9. The rule contended for here is definite, simple, and a fitting plank in a complete and *"just"* system of eminent domain procedure; while the other leads to untold mischief and inequity.

10. Since *diversion of traffic* from the neighborhood or from the premises IS NO ELEMENT OF DAMAGE in these cases, and as *beyond the scope* of the inquiry, how could INCREASE OF THE SAME KIND *of traffic be an element of* BENEFIT? (*Chicago* v. *Spoor; Chicago* v. *Jackson, point* V (2) (*b*).

11. (1) The attempt to reduce physical damage by off-setting benefits from the public work, *i. e.*, the *enterprise* (no matter how it is estimated, *i. e.*, *guessed at*), is, after all, as shown *supra, assessing the abutter* for the cost of the work. And it could only be founded on the principle of taxation.

Lewis, 3d Ed., §5.

Newby v. *Platte Co.*, 25 Mo. 258.

But a due *proportion of cost* is all that can equitably be taxed, whenever cost is taxed *at all*.

(2) A public railroad is not a "local improvement," but is of such a general and non-local character as to forbid a local assessment for its cost (unless specially provided for by constitution and statute, etc.) To assess *any benefit at all* for its construction is *illegal and unjust;* while to so assess the *entire* benefit, or to the extent of offsetting physical damage, *is doubly so!*

(3) That large and definite increases in value do gradually *occur* to property from local or neighborhood railroads, and of course usually to *some* extent upon the instant of their *establishment,* is the temptation to courts to carelessly view the gain as unearned and to reconcile them to a denial of damages to near-by or abutting property *physically* damaged. But this should be neutralized by the offsetting considerations.

a. That the property most benefited usually most *needs the work,* and usually *furnishes most of the traffic or transportation* and *profit to the enterprise*—i. e., to the stockholders and bondholders of the road. This gain is a necessary result of the modern concentration of people in small areas—i. e., modern congestion.

b. The railroad in such cases is usually a *bigger nuisance* to such abutting or near-by property and the damage is—and hence the *discrimination* in making them bear the burden for the benefit of others would be—more marked than ever.

12. *The attempt to measure market "benefits"*

from the improvement, i. e., the **entire enterprise,** *throws open the trials of these cases to inordinate length and abuse and waste.*

And it is just as hard—and just as easy—to estimate the **instantaneous** *market effect (if any) from the establishment of a railroad or other similar work, i. e., from its general facilities upon a single lot or tract of private property, as it is* **to estimate such instantaneous market effect** *upon the* **railroad** *property or* **its** *stock and bonds from the building of* **a store, residence or farm house upon a vacant lot or tract** *adjoining the right of way. This reduces the entire process or proceeding to an absurdity.*

The principles scheduled above are fully supported by

Lewis 3d Ed., Secs. 693, 702, 703;

And by the following cases selected from a mass:

Beveridge v. *Lewis*, 137 Cal. 619 (625).

Mantonville, etc., Ry. Co. v. *Slingerland*, 101 Minn. 488.

Winona & St. Peter R. R. v. *Waldron*, 11 Minn. 534.

Roberts v. *Commrs. Brown Co.*, 21 Kas. 186 (old Ed. 240).

Pochila v. *Ry. Co.*, 31 Tex. Civ. App. 398.

Hickman v. *City of Kansas*, 120 Mo. 110 (125).

Shimer v. *Easton R. Co.*, 205 Pa. 648.

Heninger v. *Peery*, 102 Va. 896.

Rourke v. *R. R.*, 221 Mo. 46, Syl. 6 (an abutter's case against an "L" road).

And the Illinois cases cited in Point II, *supra*.

And by the Illinois statute passed in 1872.

Even in the case at bar the Illinois Supreme Court again adopts the language of one of its latest cases, *Eldorado, etc., R. R.* v. *Everett,* 225 Ill. 529, to the effect that "*travel facilities*" are to be *excluded* and evidently fails to recognize that this contradicts its conclusion!

X.

A review in detail of all the "benefit" cases arising under the 1872 Act and before the Stickney case opinion was rendered.

In the following analysis we seek to more fully than ever prove Point II, *supra.*

(The italics are ours.)

For convenience we preserve the numbers in the table under Point II, *supra.*)

AS TO THE THREE CASES IN THE 70 ILLS. (DECIDED IN 1873.)

Chic., etc., R. R. v. *Francis,* 70 Ill. 239.

A bill in equity to enjoin the construction of the road—*not maintainable in Illinois in any event.* The opinion does not propose to distinguish between *physical effect scope* and market effect from the *entire* road, and the court says: "The 'diminution' must be that caused by *constructing* the road," "*or a physical injury to the property.*" Sec. 9 here in question was not referred to.

1. 1873. *Page* v. *R. R.,* 70 Ill. 324:

It was claimed by the appellant (property owner) that the jury could consider the damage to a *part*

only of the remainder—the 50 fe nearest the road. The court properly and accura ely said "that it was the effect not only on any *selec ed part* of the tract, but upon the *whole* tract" that was to be considered.

It repeats, however, in quoting th Francis case that the injury, involved *was a "phy ical injury to the property."* The term "construc on and operation of the *road*" as used by the co rt meant evidently that *part* of the road capabl of producing *"physical injury."*

Again, the court said:

> "As we understand the case before us the market value of the lands *as en hanced by the general resulting benefits* from the road, *was taken,* and under testimony intr duced *that enhanced* market value of a *narro strip* of land *adjacent* to the road would be di inished by the construction and operation of th road; taking the above together, in view of th peculiar *local* advantage of the *crossing* such market value of the whole tract would not be diminished by the construction *across it,* and o eration of the railroad."

The opinion on the benefit phase i contradictory and confusing and its *main result was clearly to credit the property its local benefit.* (It is for *this reason* that the case is later frequen ly cited along with the later *Henry* and other like c ses, *infra,* and as consistent therewith.) It then seek s to charge the property with a "crossing" benefit, a sort of "depot" or *special travel facilities* benef t, but this *limited to the easement scope of the tract* involved. Thus again confusing the subject. It was evidently considered a "physical" benefit to have *special access* to the road from one's own land.

But this "special depot" allowance or idea was not followed in later cases; and is crowded out of view by the sweeping language repeated so often in quotations made herein. And even if a benefit of "a crossing on the premises"—a species of direct *access* to the road—had still been preserved in later cases as a deliberate ruling of that court and were held to be specifically unrevoked, it is enough to say that in the case at bar it could not apply; for there is no "depot" or "crossing" on the premises nor in the block. (This "depot" benefit is a fallacy. Lewis, §703.)

The case is mainly valuable and is usually cited as authority for *taking the remainder as a whole* in reckoning damages.

1873. *Eberhardt* v. *R. R.*, 70 Ill. 347:

A two-page opinion, with practically no discussion, following the Page and Francis cases. We can get nothing out of this case, except that it evidently assumed *"enhanced value" i. e.*, the *local* and neighborhood benefit was allowed to the property.

It is therefore to be presumed that whatever does not appear otherwise in the report of the case was *in accordance* with the plain statute and not against it.

2. 1875. *Keithsburg, etc., R. R.* v. *Henry*, 79 Ill. 290:

A case where Section 9 of the Eminent Domain Act was for the first time fully considered, and where it was held that **"the language of the statute is so plain that it will not bear construction."**

The leading contemporaneous and dominating Illinois case upon the question.

It was a proceeding under the Act in question to condemn for a right of way over a farm.

After referring to the allowance for the "part taken" which under the local practice was allowed for separately or as a separate item, the court then takes up the question of damage to the property "not taken" *i. e.*, to the "remainder." The court then refers to various elements of damage which must be "direct, proximate and physical"; and then says:

> "This being so, can the company show that notwithstanding the damage thus done, the owner has received benefits, or advantages, that should be deducted? *The statute expressly provides that they shall not be deducted from, or set off against, such compensation, in any case.* Then, the whole question turns upon what is referred to by the word 'such.' * * * The word 'such' refers to compensation for *both* the taking *and damaging* of private property. The compensation, then, must be made to appellee, both for the property taken and damaged by the construction of this road, *and the statute,* as we have seen, *has prohibited any set-off or deduction from the damage his property not taken will sustain by reason of the construction of this road.* **The language of the statute is so plain that it will not bear construction.**
>
> • • • • •
>
> "*This* statute has prescribed the mode of ascertaining what compensation shall be made, *and it alone must control, and former statutes are repealed, and like decisions, so far as they conflict with the present statute, must yield to its requirements.*" (p. 293.)
>
> • • • • •

"In the adoption of this act, the General Assembly probably supposed it would *not be making a just compensation* to the owner of property taken *or damaged*, for public use, to set off or deduct therefrom benefits conferred by the construction of the road, *in common with other property not damaged* * * * *Why, as a matter of justice*, and that is what the constitution requires, *should his neighbors have large benefits conferred, and he have to pay for all he derives?* But be the reason what it may which influenced the General Assembly in its action, *the law does not deprive him of such benefits, and it must be enforced as it is written.*" (p. 294.)

3. 1877. *Hyde Park* v. *Dunham*, 85 Ill. 569:

A tier of lots one block long east and west faced north on "Madison Avenue Park" and south on 51st St.

The village filed a petition to condemn the South 17 ft. of these lots facing on 51st St. for the purpose of *widening* this block.

It was claimed by the property owner that the special benefit "to the remainder" *caused directly by the widening* of 51st St. and giving such "remainder" *direct access* to said street, could not be offset to the damage to the "remainder" caused by *reducing the size* of the lots, that is, "caused by the act of diminution."

This claim was of course denied by the court.

It was held: "In such case it is error to exclude the consideration of *special benefits* to the property not taken." (Syl. 8.)

It was also held (p. 577) that the damage to a tier

of lots owned by the same party fronting south on Madison Avenue Park, by making 51st St. a wider thoroughfare—in other words, affecting the *neighborhood traffic* to such tier of lots could not be considered in such cases—an exclusion of local or neighborhood effect.

4. 1882. *Rigney* v. *City of Chicago,* 102 Ill. 64:

This was an action by an abutter claiming damage for a radical change in the grade or plan of construction of a street, by means of which access therefrom to the abutter's lot was impeded.

It is the leading case in Illinois upon the subject, and one of the leading and most valuable cases in the American reports.

The court did not have occasion to expressly construe Section 9 of the 1872 act, but the whole gist of the decision is to define the *scope of the inquiry* in such cases and it *was* defined as *an inquiry into direct physical effect upon the use of the lot.* So this leading case is cited in Illinois interchangeably with others on the subject of benefits and damages; and it specifically rebuts the allowance and even the consideration of any indirect elements.

The court says:

"Under the constitution of 1848 it was essential to a right of recovery, as we have already seen, that there should be a direct physical injury to the *corpus* or *subject* of the property, such as overflowing it, casting sparks or cinders upon it, and the like; but under the present constitution it is sufficient if there is a *direct physical obstruction or in-*

jury to the right of user or enjoyment, by which the owner sustains some *special pecuniary damage in excess of that sustained by the public generally,* which, by the common law, would, in the absence of any constitutional or statutory provisions, give a right of action." (78)

5. 1882. *St. L., J. & S. R. R. Co.* v. *Kirby,* 104 Ill. 345:

The instruction upheld by the court was:

"'You are further instructed, for the defendant, that in estimating the damages to the balance of the farm, *you should consider this railroad as running only through this farm,* and should *not* consider any *general benefit which* the road might *be in making a better market or convenience for travel,* and you are justified in estimating the damages to this farm the same as though this road *commenced on one side of the said farm and run across said farm to the other side thereof, and run no further.*'"

This case *defines* and *illustrates* the method of assessment, and has been frequently cited in various text books and cases as a specific authority for the exclusion of general or local market benefit; instance: 10 Am. & Eng. Enc. Law, 1176; 10 Am. & Eng. R. R. Cas. 214.

6. 1883. *McReynolds* v. *R. R.,* 106 Ill. 152:

(See note in "Table" analysis, *supra,* p. 17.)

The court said (p. 158):

"Special benefits mean benefits not common to other property."

(This is not only obviously true but the *railroad*

counsel there also contended that it was specifically proved by the *Henry* case.)

7. 1885. *Dupuis* v. *R. R.*, 115 Ill. 97:
(See note, *supra*, p. 51.)

8. 1886. *Chic., etc., R. R.* v. *Blake*, 116 Ill. 163:

(See note, *supra*, p. 51.)

(Syl. 4, opinion p. 170, Mulkey, J., cites and construes the Page case, *supra*, in 70 Ill.—as supporting the exclusion of "common benefits.")

9. 1886. *Hyde Park* v. *Washington Ice Co.*, 117 Ill. 233.

A municipal condemnation case.

(Syl. 2, Op. 236):

"The question of damages is to be determined with reference to *special benefits* to the property, not taken. (*Village of Hyde Park* v. *Dunham*, 85 Ill. 569.) Any mere general and public benefit, or increase of value *received by the land, in common with other lands in the neighborhood, is not to be taken into consideration in estimating compensation. Page et al.* v. *Chicago, Milwaukee and St. Paul Ry. Co.*, 70 Ill. 324."

10. 1887. *Concordia Cemetery Assn.* v. *R. R.*, 121 Ill. 199:

(See note, *supra*, p. 51.)

11. 1887. *C. B. & Q. R. R.* v. *Bowman*, 122 Ill. 595:

(See note, *supra*, p. 53.)

12. 1888. *Kiernan* v. *R. R.*, 123 Ill. 188:

(See note, *supra*, p. 53.)

A holding that the question as to damages was the decrease, etc., in "market value of the land and property not taken, by reason of the *construction*. No suggestion that the court meant by the term "the railroad" anything more than the *local portion of the road*, alone *proper* to be considered or anything but the physical operation or nuisance.

Evidence given on part of the railroad as to selling value of other farms in the county "*cut by railroads*" held "*not* properly admissible."

13. 1888. *Harwood* v. *City of Bloomington*, 124 Ill. 48:

This was an eminent domain case brought by the city to condemn a portion of a lot for opening a street; the proceeding being under the *city* eminent domain act (Article IX of the city act, chapter 24 Rev. Stat. Ill. 1895, p. 278). Such statute did not contain any special provision as to non-offset of benefits as Sec. 9 of the Em. Dom. Act under construction here. It simply required that whenever an ordinance providing for the "making of a local improvement," * * * the making of which will require that private property shall be taken or damaged for public use, such city or village shall file a petition in some court of record of the county," etc., to have "just compensation" * * * ascertained by a jury." (Sec. 119.) Yet the court held that said Section 9 here in question and its principles applies. (p. 50.)

(Syl. 2 and p. 50 of Opinion): Held that "*special*

benefits,—benefits not common to other property—may be considered in arriving at the amount of damages the owner may have sustained to his property not taken."

14. 1888. *Wabash, etc., R. R.* v. *McDougall,* 126 Ill. 111:

The crux of the ruling in the case is shown in Syl.

(See note, *supra,* p. 53.)

15. 1890. *Chic., etc., R. R.* v. *Aldrich,* 134 Ill. 9:

This case is particularly important.

Expressly held (p. 16), that it was not error for the court, in estimating *damages* to the remainder to consider the railroad *as "running only through his farm,"* and should *not* consider any general benefits, which the road might occasion "by making a *better market, or affording convenience for travel.*" The court say:

"The instruction to the jury to consider the road only as running through the defendant's farm was manifestly given for the purpose of eliminating from their minds all consideration of those *general or commercial advantages* which will flow to the public from the construction of the road, but *which should in no way influence the assessment of damages.*" (p. 16.)

16. 1891. *Springer* v. *Chicago,* 135 Ill. 552:

A purely *local* improvement was involved here. It was an action on the case, like the case at bar, against the city for constructing a bridge over the Chicago River and a viaduct connecting therewith over railroad tracks and the approach to such im-

provement being immediately in front of the plaintiff's premises. By the viaduct-bridge improvement a new *thoroughfare* towards the east—there being none in that general direction existing before—was opened up to plaintiff's premises. That is, the entire improvement had two direct physical effects upon the property: It *impeded* access to the building by its approach, but as an entirety it directly *furnished* new street access—both *direct* effects. The bridge, viaduct *and* approach were held to be "one improvement," and the defendant *property owner* had asked for an instruction (p. 559), for damages "resulting directly from changing the grade in front of said property *taken in connection* with the *whole* improvement."

It was a case of strictly LOCAL *improvement—as local as the easement—limit of the lot—and the "whole improvement" entirely within the scope of direct physical effect.*

17. 1893. *Washington Ice Co.* v. *Chicago*, 147 Ill. 327:

(See note, *supra*, p. 54.)

Another case of *local* improvement, where it was held that "*special* benefits" could be set off to the damages, that is, "*benefits to the property not common to other property affected,*" and that the general benefits from *the opening of the street* "so as to make the tract available *in the market* for factories," etc., could not be considered.

Nearly a year later in June, 1894, this long line of consistent decisions was attempted to be upset—or modified—by the Stickney case ruling.

CASES BASED ALONE ON CONSTITUTIONAL CLAUSE OF "JUST COMPENSATION."

(Arising after adoption of 1870 constitution and before 1872 act and referred to, *supra*, Point II.)

(1874) *Chic., etc., R. R.* v. *Stein*, 75 Ill. 41.

A claim that *access* to dock property was *impeded* by the erection of a railroad bridge and a protection thereto in the river, right opposite the lot.

The upper court found *as a fact* that such access was not impeded, "that there is no trouble in getting a vessel in and out between the bridge and the dock," etc.

Held also that for such incovenience from the structure "as might discommode those who may *reside in the vicinity of the route* where the improvement is made, and to some extent damage or lessen in value property," etc., damages could *not* be recovered.

(1876) *Shawneetown* v. *Mason*, 82 Ill. 337.

Action by an abutter against the city for constructing an embankment in the street and causing a radical change in the grade thereof.

It was held (Syl. 6, Opinion, p. 344): "*any general benefit common to all other property affected by the work should not be considered in determining whether the property is benefited as much as injured.*"

(1876) *Elgin* v. *Eaton*, 83 Ill. 535.

Action on the case by Eaton against the City of Elgin, occasioned to a corner lot by a radical change

of grade *immediately in front* of the lot of both abutting streets.

It was held that the cost of changing the grade of the lot to correspond with the street, as one element of damage, should be considered in connection with the fact that the *direct access* to and *egress from* the lot was increased. Citing a prior case (*Brereton*) involving a benefit from increased *direct access*, citing the latter (p. 536). There was no suggestion by any counsel in the case that the court should allow neighborhood benefits for which the lot could *be assessed* in a local assessment case.

(1878) *Chicago, etc., R. R.* v. *Hall*, 90 Ill. 42.

Action by abutter against railroad company for constructing a railroad in abutting street, in which only *physical damage* was claimed in the way of the road "causing smoke, dust and cinders to be thrown upon his house and lot, thereby depreciating the value of the lot."

It was held:

> "The true measure of damages is the loss sustained by the *nuisance* * * *. *The injury must be physical.*" (Syl. 3, Opinion, p. 46.)

It is seen that these cases in their *facts, language* and *conclusions* are consistent with the *post*—1872 cases, based on constitution *and* statute.

CONCLUSION.

A significant object lesson of what this speculative evidence as to "general" benefit can lead to is shown in Demarest's review of the New York elevated railroad cases. At the outset in his preface, he refers to the great volume of litigation which arose first from attempts to consider the *easements* of a lot separately from the right of proprietorship over the *lot proper*, and secondly, and chiefly, by reason of the great confusion arising from bringing into the assessment of damages the subject of benefits other than those which are direct and special. (Over 200 N. Y. decisions cited—the product of this confusion as early as 1894!)

The courts there held that evidence of *values* before and after the work was constructed *including* evidence of increased travel, etc., was competent, but evidence as to the *effect* of the work (including "travel" benefits) measured in money was not, and that *expert witnesses* giving their opinion as to the latter were thereby invading the province of the jury.

In other words, the New York courts admit the *speculative character* of the benefits which they allowed *to come into* the case, and then condemn the testimony on the ground that it *is* speculative,—*and then leave this speculation to the jury!* (Demarest, pp. 157-9.)

The courts there finally adopted a sort of forced rule, which rule resulted *practically* in leaving out of view, at least in the main, these neighborhood or general travel facilities benefits.

They held that the special benefits from increased travel must be "*peculiar,*" etc., and Mr. Demarest finally concludes that what they mean by this term as it was finally modified is:

> "The meaning, then, would seem to be that the benefit will be special if it be possible truly to characterize it by the term 'specific.'" (p. 180.)

After commenting, then, upon the hopelessly fluctuating and overlapping decisions, *pro* and *con*, upon this vague and shifting area of confused elements indirectly producing market effect, Mr. Demarest finally condemns the New York decisions allowing them, and says (p. 185):

> "*They repealed the statute*"—a statute which clearly, though in no such sweeping terms as the Illinois statute, provided for the exclusion of general benefits.

It is well known that the property owners in the built up portions of New York finally recovered against the roads; and it would seem that their damages were usually gauged by just the amount that the property *failed to advance* when compared with *other* property on nearby lateral streets, whose general character before the road had been the same as that which had been selected to bear this structure—and its nuisance. (This is *practically* the measure of *physical effect.*)

> *Israel* v. *Manhattan R. Co.*, 158 N. Y. 624.
> *Shepard* v. *Same*, 169 N. Y. 160.

In the other states where the rule allowing general market benefit has been more or less tentatively adopted, they have had to escape from its confusion-

producing effects by putting the *burd* *en* upon the railroad company of proving the *speci* *c* market increase which comes from the general mprovement itself—in reduction of direct, proximate and physical damage.

In this way the courts of those state s which have allowed to come into the case evidence of this mischief-breeding element have been force d in turn to crowd it out, viz: by making the pa ty asserting such benefit *prove* it, and the *amount* of it—which of course it never can do.

This usually results, as it did in N ew York, in allowing the item of *direct physical dan age* to stand entirely or practically as the only prov en item—because the only one *capable* of proof—a nd thus usually resulted, though at awful cost, in practical *justice.*

Respectfully submitted,

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No. 268.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1914.

ELLA A. BRAND, et al., as Executors, etc.,
Plaintiffs in Error,

vs.

THE UNION ELEVATED RAILROAD COMPANY, et al.,
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IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY OF PLAINTIFFS IN ERROR.

JOHN S. MILLER,
HARRY S. MECARTNEY,
FOR PLAINTIFFS IN ERROR.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

Counsel for defendants in error seem to have made their chief effort in their brief on motion to dismiss, etc., and they refer chiefly to the arguments embodied in such brief for support of the points made in their brief on the merits.

We agree to the statement (p. 7) that: "Opposing counsel and ourselves certainly do not seem to be able to read the same cases the same way," etc.

But it seems to be far worse than this; and that we are not able to read *any one of twenty or more cases the same way.* For counsel seem to go Mr.

Justice Farmer "one better," and even take in the Henry case in their 40 year list of cases which they assert "uniformly" support their contention.

In this case we claim:

1. A *plain statute* in our favor, and one "too plain to bear construction."

2. A series of *court rulings* in Illinois covering a period of twenty-two years (from 1872 to 1894), which

(1) *Uniformly followed* the plain terms of the statute.

(2) *Illustrated* it in the most specific and objective way, as in the Kirby and Aldrich cases; and

(3) *Repeated* its cardinal ruling *in almost every conceivable way, and using almost every set of terms known to the profession in stating it,* viz:

(a) By expressly *excluding* all "indirect" "public," "common" or "general" benefits.

(b) By expressly *excluding* all benefits which are "speculative and incapable of estimation in dollars and cents."

(c) By expressly *including* only *special* benefits.

(d) By *defining* such special benefits, viz., first in the way of stating what they *are,* and, secondly what they *are not.*

(e) By repeating over and over again that the *scope of inquiry* as limited to "direct and physical" effect, etc., etc.

In contrast to this, our adversaries claim: that the decisions of Illinois "have always been uniform," commencing practically with the organization of the state, until now, and have been *uniformly* and *without any exception* to the effect that the general *mar-*

ket or *travel facilities* or other facilities furnished by the public improvement *in its entirety,* can be considered, estimated and offset to direct physical damage. It will be for this court to decide which side to the controversy is using the wrong set of spectacles.

The counsel, however, apparently do not claim that the rule which they announce is a *just one*—they "will not burden the court with our (their) own views on the subject" (p. 7). Nor have they expressly denied that the STATUTE *plainly prohibits* the offsetting of at least *special* if not all kinds of benefits; certainly at least they have not accepted the challenge to point to the *words* of the statute for support to their claim. Whether this occurs from oversight or from conviction, we, of course, cannot tell.

—o—

As to evidence of improved market or "boom" conditions in 1897 the references to the printed record were omitted through inadvertence. We now refer to pp. 93-94 (P. R.), where, in answer to a question "about the condition of the market," Mr. Florup says that it was an "ordinary" market up to 1897, "*but in* 1898 *there was a boom,* and rents I remember at the time was—where we did not have long leases we were trying to get more rents, all right." That the boom began in the fall of 1897, just about the time the elevated railroad was put into operation.

> "Q. You are referring to the *general market conditions* of the city?
> A. Of the city."

On p. 94 he states that from 1893 to 1897 there were no boom conditions, and in answer to a ques-

tion, "The panic was here then, wasn't it?" answers "Yes."

Then in answer to a question as to whether or not the property "advanced until the boom happened in the fall of 1897," he states that it did not, that the value of the property for sale—*i. e.*, its "holding" or "selling" value—was about the same, but the rents were lower, and that "it was a case of carrying the property."

We gather from the schedule of observations on pp. 2-3 that counsel can see no case of "damages proven" from proof merely that an elevated railroad structure *is placed* in the street in front of a five-story building. That if this proof is *supplemented* by *specific* proof of what we claim are well-known *effects* from such a structure, viz.: that the light is actually obstructed by the structure, that noise is constantly endured or suffered from the passing of trains, and the building is also thereby caused constantly to vibrate, that dirt and dust and ashes are continually thrown upon the premises, that the general freedom of access is impeded by a number of upright or supporting posts constructed in the block, some of which are in fairly close proximity to the structure, etc., etc., still counsel see in all this no evidence of damages proven and *no evidence* from which it can be inferred.

They say "juries are not supposed to infer;" and hence claim that it is necessary for some *witness*, after having testified as to such *physical interferences* with the *actual use and enjoyment* of the premises, to say or to give it as his *opinion* that these *physical*

interferences with the *enjoyment* of the premises are not beneficial—*i. e.*, that they are *not "enjoyable"*—and would tend to decrease rents and market values, etc.

That is, that it is necessary for some witness "to infer" *for the jury.*

And when in addition to such a showing, *actual loss in rents* upon a *rising market* is shown, it is necessary to trace this loss, or some of it—through the medium of some witness' *opinion*—to these physical interferences.

Not only this, but when a witness *does* "infer" the jury are *obliged to accept* his inference. As, for instance, in the case of Florup testifying that in his opinion the market value of the property—*i. e.*, the *ground only*,—was $4,800 per foot before and for five years after the construction of the road, etc., this is conclusive evidence of that fact—is conclusive of "cause and effect" (p. 18)—and the jury are bound to find no decrease in market value and no loss; and they cannot find from *other* facts in the case that there *was* an actual market *decrease* in the value of the property, or that there was a *loss.*

Mr. Florup's opinion, that is, his inference, say they—as also said the trial court—is conclusive.

It obviously would require on the one hand but little extension of the functions of a witness, as here claimed, and on the other, but little contraction of those of the jury as here claimed, to enable us to dispense with the jury altogether.

———o———

On pages 4 and 5 and in Point IV (pp. 17, 18), it is claimed that our main ground of complaint is not embodied in the record in such technical form as to be available to us or amenable to review by this court.

Reference is had to a statement of ours to the effect that the trial court had held in effect that there was a benefit from the establishment of the road which offset the physical damage, "or its holding of necessity implied that there was" such a benefit.

A word of explanation:

1. To prove that there *was* such a *structure in the abutting street,* as we claim, *proves the damage;* for the effect of the structure and the general nuisance of its operation is known by everybody.

2. But to *specifically* prove by a witness these general nuisance effects upon actual use of the premises *still more completely* proves damage.

3. To *further* prove a *loss of rents* immediately after the structure was built is to furnish *still further* evidence of damage; and all this taken in connection *with further proof of a generally rising market* makes proof of damage not only full but *practically conclusive.*

Therefore, we claim that the proof of physical damage being clear (and the trial court finds or concedes or assumes such damage in the first instance in its opinion), its ruling that there was no evidence of ultimate or *net* damage from the *entire* improvement is a holding, at least *by implication* or *by necessity* that *benefits* from the improvment *must have offset* the damages suffered.

But, assuming or conceding that the trial court did not rule specifically or impliedly that "travel facilities" or general benefits should be considered in offset or that they fully equaled the physical damage, etc., or that this particular point of law was not decided by it—this would not leave this court without jurisdiction in this case. Because, when the case reached the Appellate Court of Illinois, the record there showed, as before, a *case of proven damages taken from the jury,*—but *embodying* in *its claims* and in *its proof* this element of benefit from the entire improvement; and in that court the issues were simply *narrowed* by the plaintiffs in error (appellants there), by their conceding for the purposes of the case—and saving *their constitutional rights*—that such general benefit was great enough to fully offset the damage as a matter of *fact.*

The Appellate Court took cognizance of this stipulation or concession and *turned the case entirely upon this issue* of general benefit, and affirm the judgment upon the *express ground* that these offsetting benefits *could in law* be charged against these abutters.

This same situation and result was repeated in the Supreme Court of Illinois. And the case comes to this court with this exact legal issue and *this only* clearly revealed in the record, and decided adversely to plaintiffs in error by the state court of last resort.

If counsel do not fully grasp the force of these suggestions, we despair of making our position any clearer to them.

———o———

In Point I the counsel refer to their Point II of their former brief, in which they list nearly all the Illinois cases on the subject decided during the history of the state, and then claim that the construction of each and all has been not only uniform, but uniformly their way.

Referring to their argument under this head, or that portion particularly referring to cases under the 1872 act (pp. 52-67):

We have analyzed in our main brief every case referred to therein, and the court can be aided but little by any attempt on our part to re-analyze them or point out in detail what seems to us radical and repeated aberrations in counsel's view of their essential import.

We briefly referred (p. 68) to the law prior to the 1872 Act simply (1), to show the *occasion* for the adoption of such sweeping and comprehensive language in said act, and (2), to explain how it came that in the rather hasty opinion in *Page* v. *R. R.*, 70 Ill. 324, the court, in taking the value of the property, both as to "part taken" and "part damaged," and professing to hold to a "physical" effects scope, took the *value "as enhanced by the resulting benefits from the road,"*—thus *allowing* the owner the market benefit—and then unconsciously and erroneously attempted to deduct a special depot or "crossing" benefit. The proper rule was—as developed by later opinions of the court—to consider the *value totally unaffected* by the location of the road, and then expressly hold the inquiry (as to damages to "the remainder") down to physical effects, and *reject* "depot" and *all other* travel benefits as *not* physical,

but as a market benefit belonging to the owner, and not involved in the inquiry.

While in later cases this distinct portion of the dictum or ruling of the Page opinion which refers to a "depot" or "crossing" benefit is not formally overruled, yet it is *effectually* overruled by the many and frequent *definitions* and *deliminations* of the settled doctrine on this subject by the same court, and always resulting in its *expressly eliminating all* market or travel facilities. As said before, such question of "depot" or special travel benefits is not involved in this case in any event, since the sketches and testimony reveal no depot upon these premises or in front of the property, and no claim is made in the record that there is or was any; and the nearest station mentioned in the construction ordinance is at or near Adams street. (Par. 5, bottom p. 104 P. R.) It would not be inferred from a description of a railroad running through a farm that a depot was located thereon.

We fail to follow counsel in their analysis of the various cases listed in our former brief. They make full references to the Page case and its two companion cases, which simply profess to follow it and also its "physical effects" expressions as well. We have furnished our analysis of these (pp. 44, and 84-86). As to the other cases, they seem simply to pick out a sentence or two here and there from some of the cases, and then conclude that " the court has consistently held that where an *improvement* causes a *distinct* added value to the property not taken, it is specially benefited," etc. (p. 61.)

We do not so read the cases; and all this still begs

the question of what the court referred to as "the improvement."

Obviously in railroad damage cases in speaking of "the improvement" or of "the railroad," the court only meant by that term the *portion* of the entire "improvement" or "railroad" which had the capacity *of physically affecting* the property, or *physically interfering with its actual use.*

Counsel seem to have even the temerity or recklessness, as the case may be, to quote (pp. 62-3) fully from the Aldrich case (134 Ill. 9), where the Illinois Court's rule of exclusion of general benefits is *illustrated* and enforced by holding the inquiry down to viewing the railroad *"as though it only ran through defendant's farm!"*

With these explanations it will serve no useful purpose for us to do more than re-refer to our detailed analysis in the main brief.

———o———

Under their Point II counsel question our averment (pp. 10, 11), that in this class of cases "all rules of evidence *as to damages and compensation* are applicable which are applicable to the statutory proceeding," or, as stated in the Aldis case 203 Ill. page 567, that the "*measure of damages* and rules of evidence are the same as though a condemnation proceeding had been brought to determine the damages prior to the construction."

They refer to *White* v. *R. R.*, 154 Ill. 620, where it was simply held that the railroad could not be *required* to use the act where no part of the lot proper was taken and where it *denied* that certain nearby

property—not even abutting property a t that—had been damaged. The court did *not* rule there, however, that if the company had *adm itted some* damage and had brought a proceeding t o determine the amount thereof the rule of damages would have been different from that obtaining where "damages to the remainder" was involved; nor did i t attempt to overrule the prior cases cited by us on this point.

Counsel refer secondly to an Appe llate Court opinion of *Metropolitan, etc., R. R. Co.* v. *Goll*, 100 Ill. App. 323, where, in conflict with a pri or Supreme Court opinion in *Culbertson & Blair P. & P. Co.* v. *Chicago*, 111 Ill. 651 (syl. 2) that court h ad held that the view of the jury was not evidence. Th e mere fact that the Illinois courts have "wabbled," c onsiderably on this proposition—a matter affecting th e mere *con-duct* of the trial—does not affect the rep eated holdings of that court upon the *substantive iss ues* of damages and compensation, or upon the *proj perty rights* of the parties.

We therefore say:

1. It has been repeatedly ruled that i n abutters' cases "damages and compensation" are to be considered as in a statutory proceeding brou ght to ascertain the damage.

It would be hard to conceive that in the former case the courts would hold that the abut ters' *rights* were different or his damages less or m ore because the condemnor had failed to condemn or to *commence the proceeding* and thereby the a butter was forced to commence it.

2. As almost every decision in Illinois since 1872

will show, the abutters' cases are *cited interchangeably* with cases brought under the act.

3. The case of *Harwood* v. *Bloomington*, 124 Ill. 48, cited by us (p. 11) and decided long before the purchase by Brand, if different in principle from the case here was one still farther removed from the Eminent Domain Act. But it was held in substance that Section 9 as a *statutory interpretation of the constitution* furnished an *inexorable* rule for *all* eminent domain cases "as to *compensation* and *damages.*"

4. In this very case at bar the Supreme Court of Illinois impliedly reaffirms its prior position in the Aldis and other cases in assuming that Section 9 is involved, and in correcting the counsel in his reference to the Stickney opinion in respect thereto (258 Ill. 133, p. 139).

5. Even if there had been no *express* ruling that the statute applied, the *statute* taken *in connection with* the prior decisions under the constitution alone would constitute the entire judicial state construction upon the constitutional clause as to "just compensation"; and a radical and legally arbitrary change of construction of a constitutional claim can amount to a lack of "due process" as well as in such a case arising under a statute alone.

———o———

As to point III:

It is immaterial whether we rest our case upon the "due process" clause or upon the "contract" clause.

Expressions are found in various opinions in this court in these *eminent domain* cases—where the *di-*

rect object is to *take property* on behalf of the State (or public) or to recover for such taking, the same thing in effect—that it is immaterial whether the rights of the property owner "be stated or considered in terms of contract, or in terms of property."

The deeds in this case of property abutting on Wabash avenue are as much *contracts* as were the deeds in the Muhlker case; and, the ordinance establishing the railroad or providing for its construction on the abutting street here is as much a *legislative act* as was the act of the legislature of New York providing for the construction (or change of construction) of the railroad in Park avenue.

Point IV we have answered above.

CONCLUSION.

In conclusion, we suggest that a case is here presented by plaintiffs in error, seemingly much stronger on its merits than the Muhlker case.

In the Muhlker case there were two decisions of the New York court, covering a six year period, clearly and thoroughly establishing and defining the property right involved. The Story case was decided in 1882; the Lahr case in 1887. Muhlker purchased in 1888.

In the present case there is a specific statute so plain as to *need* no construction, and during the *seventeen years* intervening the passing of the statute and the purchase by Brand, there were *over a dozen cases,* as shown in the table, *construing, sus-*

taining, defining and *illustrating* such right in his favor.

Some statutes may be "too plain to *bear* construction;" and a mystery cannot be made out of them —any more than could be made out of any one of the ten commandments—simply by bringing them into court and making them the subject of a lawsuit.

When a distinct property claim is not only based on justice but is also plainly warranted by an express statute, and the construction of this worn threadbare by supporting decisions for a dozen or a score of years, a court destruction of said right shocks and sickens one's sense of justice as well as one's professional ideals of *accuracy* in the deliverances of courts as such.

And the fact that an accident of this kind is ever *apt* to occur, though of course very rarely, may be a justification for an express provision in our national constitution that the national court may review—and save—in such rare case.

Respectfully submitted,

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For Plaintiffs in Error.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1913.

No. 268.

ELLA A. BRAND, E. L. BRAND, JR., and E. BELLE BRAND ATWELL, As Executors of the Estate of EDWIN L. BRAND, Deceased,

Petitioners,

vs.

THE UNION ELEVATED RAILROAD COMPANY, THE LAKE STREET ELEVATED RAILROAD COMPANY, THE SOUTH SIDE ELEVATED RAILROAD COMPANY, THE NORTH-WESTERN ELEVATED RAILROAD COMPANY, and THE METROPOLITAN WEST SIDE ELEVATED RAILROAD COMPANY,

Respondents.

Motion of Respondents to Dismiss for want of Jurisdiction, and to affirm the Decision of the Supreme Court of the State of Illinois, and Argument Thereon.

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BARNARD & MILLER PRINT, CHICAGO.

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Petitioners,

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Respondents.

Motion of Respondents to Dismiss for want of Jurisdiction, and to affirm the Decision of the Supreme Court of the State of Illinois, and Argument Thereon.

STATEMENT OF THE CASE.

In order to give the court a clear idea of what this matter is about, and the grounds for the motion to dismiss, we set forth:

1. The statement of what is involved, as set forth by counsel for plaintiff in error in his petition for the writ of error.
2. The opinion of the Illinois Supreme Court.

3. The dissenting opinion of Mr. Justice Cartwright.
4. The assignment of errors.
5. A short statement of our own showing the rule of law complained of.
6. The points relied on as showing this court will not take jurisdiction.
   (a) The record does not present the question pressed by counsel for plaintiff in error.
   (b) There has been no change in decision by the Illinois Supreme Court in the case at bar now announcing a rule of law and of property different from that in force prior to the purchase of the property in question by plaintiff in error, and the case is not within the doctrine of *Railroad* v. *Muehlker*, 197 U. S. 544.
   (c) When parties have been regularly heard in regular course of judicial proceedings, an erroneous interpretation of a state statute by a state court does not deprive the unsuccessful party of his property without due process of law, deny him the equal protection of the law or impair the obligation of his contract. The statute itself not being attacked for unconstitutionality, this court will not disturb the State Supreme Court's interpretation of that statute, nor harmonize its decisions if they are conflicting.

(1) Statement of Counsel for Plaintiffs in Error in His Petition for the Writ.

"This writ of error is prosecuted for the purpose of having the Federal Supreme Court review on constitutional grounds the decision in *Brand* v. *Union Elevated R. R. Co.*, 258 Ill. 133, rendered February 13th of the present year. [1913]

The cause was tried in the Superior Court of Cook County. At the close of plaintiffs' evidence the court instructed the jury peremptorily for defendants.

On appeal to the Appellate Court of Illinois all claims of error except one were waived by plaintiffs and appellants—who will be herein referred to as plaintiffs—so as to leave but that one question on the record, and that a question of law. The Appellate Court affirmed. On further appeal to the Supreme Court of Illinois, the latter also ruled adversely to plaintiffs, and they now assert that such ruling infringed their constitutional rights.

The case is an action brought against the Union Elevated Railroad Company, which constructed the railroad known as the downtown "loop" in Chicago, and the four other companies for whose joint use it was constructed.

The road was of the ordinary type of elevated railroad structure, laid upon upright posts in the street, having the special feature of being used by four different roads or feeders ending downtown, and hence specially noisy and offensive to abutting owners and their tenants.

The structure itself, with its noisy opera-

tion is, of course, a definite interference with the ordinary enjoyment of the premises and its street easements, and is hence an obvious "physical" damage to the lot.

Plaintiff's sole witness, after describing the structure and its operation and its nuisance effects upon the property and its uses, etc., testified that for several years after the structure had been erected the market value of the property was the same as it had been immediately prior to its erection.

Thereupon the trial court held there was *no proof* of damage.

As market conditions may have been far more favorable after the road was built—in fact, the witness stated there had been a real estate "boom" or general advance in values throughout the city about this time—the fact that the market value had not decreased did not prove *no damage*. Nor did it prove that there had been an offset in general "road" benefits to the actual physical damage set forth above. There was hence obvious error in the record, even upon the trial court's own view of the law as to offsetting such general benefits presently to be noted.

In order to make the case a test one as to the chief question involved, the plaintiffs filed certain withdrawals of error in the Appellate Court, leaving open substantially this one question:

> 'That in considering the effect upon the premises in question from the railroad structure in question, the jury must exclude from consideration the enhancement in value of the property in question, if any, resulting from the facilities furnished by the improvement.'

It was this proposition of law which the Appellate and Supreme Courts each denied in their several decisions and judgments."

Since the Constitution of Illinois provides that private property shall not be taken or damaged for public use without just compensation, and Section 9 of the Eminent Domain Act passed pursuant to that language in the Constitution, provides that no benefit or advantage which may accrue to lands or property affected, shall be set off or deducted from such compensation in any case, the plaintiffs' claim:

"1st. That to exclude them as property owners from sharing in the local market benefit arising from the establishment of the public improvement as a whole is clearly unjust and is *per se* a denial of the 'equal protection' (or benefit) 'of the laws' and also a deprivation of property 'without due process of law' forbidden by the Federal Constitution.

2nd. That it is violative of the following express guaranties of the Illinois Constitution—(a) in reference to 'just compensation,' *supra;* (b) in reference to a deprivation of property without due process of law, Para. 2, Art. II; (c) in reference to the impairment of contract, Para. 14, Art. II.

3rd. That it is a violation of the plain specific and comprehensive terms of the Illinois Eminent Domain *statute*—a statute which the Illinois Supreme Court had once said *'is too plain to bear construction.'* (*R. R.* v. *Henry,* 79 Ill. 290.) That this violation of this express *statutory* right is 'a deprivation of property without due process of law.'

4th. That plaintiffs' intestate Brand purchased the property (in 1889) after a *long line of consistent decisions* had been rendered construing this statute and laying down a rule in consonance with its plain terms, and before the

initial case of *R. R.* v. *Stickney*, 150 Ill. 362, attempted to reverse such rule. That the rule of law so established cannot be reversed without prejudice to plaintiffs' constitutional rights; and that the late decision and judgment here attacked is a taking, etc., 'without due process,' etc.

See—

Muhlker v. *Harlem, etc., R. R.*, 197 U. S. 544;

Great Southern Hotel Co. v. *Jones*, 193 U. S. 532;

C. B. & Q. R. R. v. *Chicago*, 166 U. S. 226;

Scott v. *McNeall*, 154 U. S. 34-35."

(2) Mr. Justice Farmer delivered the opinion of the court:

This suit was brought by appellants against appellees to recover damages alleged to have been sustained to their property from the construction of an elevated railroad in the street upon which the property abuts. Appellant's property fronts east on Wabash avenue in the City of Chicago, and is situated between Jackson and Van Buren streets. Upon the request of the parties the jury viewed the premises, and appellants introduced on the trial the testimony of Christian Florup, who was engaged in the real estate business, and was, and had been since prior to the construction of the elevated railroad, agent for the property and collector of rents of the building. He was the only witness offered upon the question of damages. At the conclusion of the evidence for appellants, the court, on motion of appellees, instructed the jury to return a verdict of not guilty. A motion by plaintiffs for a new trial was overruled, judgment rendered on the verdict and plaintiffs appealed to this court. The court, being of opinion no constitutional question was involved authorizing an appeal direct to this court, transferred the case to the Appellate Court for the First District. That court affirmed the judgment of the Superior Court and granted a certificate of importance, upon which plaintiffs below have brought the case by appeal to this court.

Numerous errors were assigned in the Appellate Court, but counsel for appellants states in his brief that all of them were withdrawn except those raising the question of the correct rule for assessing damages to property not taken, but affected by a public use, and this is the only question discussed in the briefs in this court.

Appellee's elevated structure was completed and the road put in operation in October, 1897. The witness Florup described appellant's build-

ing and its uses and the effect upon the property and its use by the construction and operation of the elevated railroad. He testified to the rentals received from the building before and after the construction of the road and the value of the property before and after its construction. He placed its value at $4,800 per foot before the road was built, and testified that it did not decrease in market value by reason of the construction of the road. About three years after its completion, the property increased in value to $6,500 per foot. The undisputed evidence, therefore, was that the market value of appellants' property was not depreciated by the construction of the road. It is claimed, however, that this was the result of general benefits common to all property in the neighborhood served by the improvement, and that such benefits should not be considered in determining the damages, that only special benefits, such as are a direct physical improvement to the property, like the draining of a wet, swampy tract of land by the improvement, or building a bridge across a stream running through the land, which enables the owner to enjoy it with greater advantage by reason of the improvement, should be considered in determining whether the property is damaged. Appellants contend that the benefits to their property by reason of the improvement which operated to prevent a decrease in its market value, were general benefits; that there were no special benefits, but, on the contrary, the improvement injuriously affected the use of appellants' property by obstructing air and light, by noise and vibration, and by interference with access to their property, and they insist they are entitled to recover the damage thus resulting without any reference to the other benefits that may have resulted from the improvement.

This question is not a new one in this state. Since the adoption of our present constitution and the passage of the Eminent Domain Act the question has been passed upon by this court a

great many times. The first reported cases are, *Page* v. *Chicago, Milwaukee and St. Paul Railway Company*, 70 Ill. 324; *Chicago and Pacific Railroad Company* v. *Francis*, 70 *id.* 238, and *Eberhart* v. *Chicago, Milwaukee and St. Paul Railway Company*, 70 *id.* 347. In all three of those cases it was held the true measure of compensation for land not taken by the improvement was the difference between what the property would have sold for unaffected by the improvement, and what it would sell for as affected by it. In the Francis case the court said: "It cannot be said appellee has sustained damage when his property is worth and will sell for as much or more than if no road had been built." That case was cited and the rule announced adhered to in the Page case. The decision in the Eberhart case (opinion by Justice BREESE) was based upon the Page and Francis cases, and the opinion in the Page case was referred to for a discussion of the proper measure of compensation for property not taken. The rule announced in those cases has, with one exception, been followed in subsequent cases, down to *Metropolitan West Side Elevated Railway Company* v. *Stickney*, 150 Ill. 362. That was a proceeding to condemn the right of way across certain lots, in which proceeding damages were claimed and awarded for injury to the parts of the lots not taken. The court instructed the jury that it could not consider any benefits to the property which might arise from the construction and operation of the railroad, unless the evidence showed such benefits were special to the particular property and not shared by it in common with the generality of property in the vicinity of the line of the proposed railroad. In the opinion the court reviews all its previous decisions since the adoption of the constitution of 1870, and sums up its conclusions in the following language: "It therefore follows that every element arising from the construction and operation of the railroad or other public improvement, which, in an appreciable degree, cap-

able of ascertainment in dollars and cents, enters into the diminution or increase of the value of the particular property, is proper to be taken into consideration in determining whether there has been damage, and the extent of it. Thus, the situation of the property, the use to which it is devoted and of which it is susceptible, the character and extent of the business to which it is adapted, before and after the construction of the public work, and indeed, every fact and circumstance legitimately tending to show a depreciation or enhancement of the value of the property, are proper to be considered, so far as they tend to show the actual value of the land without and with the proposed taking for the public use, while, on the other hand, a consideration of facts or circumstances tending to show those general benefits supposed to flow to the community at large, or to the public generally, from the construction of the proposed railroad or other public work, and the effect of which, in determining the injury or benefit to the particular tract of land can not be other than conjectural and speculative is excluded."

Appellants insist this decision and others in line with it are wrong; that the rule adopted in this state is contrary to the weight of authority in other states and to the views of Mr. Lewis in his work on Eminent Domain; also, that the rule is in conflict with *Keithsburg and Eastern Railroad Company* v. *Henry*, 79 Illinois 290, and Section 9 of the Eminent Domain Act. It is quite true, the decisions in this state upon the question here under consideration are not in harmony with the decisions of courts of last resort in some of our sister states, while they are in harmony with the decisions in some states. The conflict between the decisions in this state and the decisions of other states relied upon by appellants is not so much as to a rule of law as it is to the application of the rule. This court is in accord with cases in other states holding that only special benefits are to be considered in making just compensation for land damaged

by, but not taken for, a public use. *The difference is principally as to what are general benefits and what are special benefits.* Some courts hold that only those benefits are special which directly and physically operate upon the particular property in a manner different from and not shared in common by other property in the neighborhood and which enable the owner to use it with greater advantage. All other benefits which increase the market value of the particular property in common with other property in the neighborhood are held to be general benefits. This view has not been adopted in this state. The rule adopted in this state is thus stated in the Stickney case: "If property is enhanced in value by reason of the improvement, as distinguished from the general benefits to the whole community at large, it is said to be specially benefited, and is to be assessed for the special benefits, notwithstanding every other piece of property upon or near the improvement may be, to a greater or less degree likewise specially benefited. (*Wilson* v. *Board of Trustees,* 133 Ill. 443.) In other words, it is not such benefit as is special to the particular property thereby excluding the consideration of such benefits as are common to other property similarly situated, but is such benefits as that the particular property is by the improvement enhanced in value—that is, specially benefited. * * * If a piece of property is enhanced in value, such enhancement,—or in other words, benefit to the property,—can not be said to be common to any other piece of property. Each piece of property especially enhanced in value is thus specially benefited within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties. It follows, necessarily, that where the benefits are designated as 'general benefits,' 'benefits common to other property,' and the like expressions to be found in decided cases, it is meant those general, intangible benefits which are supposed to flow to the general

public from a public improvement. * * * By a practically unbroken line of decisions in this State it is well settled that the test, under the present statute, as to whether land not taken is damaged, is the effect of the improvement upon the value of the land. Under the rule, land is said to be damaged only when there is a diminution in its value,—a depreciation in its price or worth,—and the compensation required to be made is the amount of depreciation or diminution in value occasioned by the construction and operation of the railroad or other improvement. Special benefits are such benefits flowing from the proposed public work as appreciably enhance the value of the particular tract of land alleged to be benefited. As already said, the fact that other property in the vicinity is likewise increased in value from the same cause —that is, also specially benefited by the improvement,—furnished no excuse for excluding the consideration of special benefits to the particular property in determining whether it has been damaged or not, and if it has, the extent of the depreciation in value. * * * Hence, all imaginary and merely speculative damages or benefits are excluded from consideration. The consideration of such benefits as tend specifically to enhance the value of the particular property is not setting off benefits against the damage to the property, but is the simple ascertainment of whether the land has been, in fact, depreciated in price or worth,—that is, whether loss or damage has resulted to the owner—for if his property is of the same value after as before the improvement, he has sustained no loss."

The only case in this State that is out of line with the Stickney case and those previously and subsequently decided, is *Keithsburg and Eastern Railroad Company* v. *Henry, supra,* and that case has not been followed in any subsequent decision.

Counsel is in error in saying the author of the opinion in the Stickney case failed to mention section 9 of the Eminent Domain Act. It is ex-

pressly referred to on page 373 in commenting upon the Page case, and that part of the section relied upon by appellants is quoted. The section was also quoted in the Page case. The Stickney case and the previous decisions, with the one exception, referred to, have been since uniformly followed and adhered to. The last cases to which our attention has been called are *Peoria, Bloomington and Champaign Traction Company* v. *Vance*, 225 Ill. 270, and *Eldorado, Marion and Southwestern Railroad Company* v. *Everett*, 225 *id.* 529. In the Vance case the court said: "Since the adoption of the constitution of 1870 it has been uniformly held by this court, in such cases as this, that the measure of damages to land not taken is 'the difference in the fair cash market value of the land before and after the construction of the railroad,' or 'the amount, if any, which lands not taken will be depreciated in their fair cash market value by the construction and operation of the proposed road. * * * Under the rule adopted in this state for determining whether, or in what amount, property not taken will be damaged by the construction and operation of a railroad, any benefits which are not conjectural or speculative, and which actually enhance the market value of such property, are to be considered as special benefits and not as general benefits, within the meaning of the rule that general benefits cannot be considered in determining whether, or in what amount, property not taken will be damaged. Special benefits do not become general benefits because the benefits are common to other property in the vicinity. The fact that other property in the vicinity of the proposed railroad will also be increased in value by reason of the construction and operation thereof furnishes no excuse for excluding the consideration of special benefits to the particular property in determining whether it has been damaged, and if it has, the extent of the depreciation in value.

In the Everett case the court said: "The real

question submitted to the jury, as repeatedly stated in the decisions of this court, was the value of the land not taken, at the time of filing the petition, with and without the improvement, and the fact that other property in the vicinity is increased in value by the construction and operation of the road furnishes no excuse for excluding special benefits to the particular property in determining whether it has been damaged or not. * * * The lands, generally, along the line in this vicinity were coal lands, and might all be benefited by reason of improved facilities for mining and transporting coal. Considering benefits which enhance the value of the particular property is not setting off benefits against damages, but is simply ascertaining whether there are damages or not. If the property is of the same value after as before the improvement the owner has sustained no loss. Damages can not exist if the value of the property is not lessened, and the benefit which the land owner secures as an owner of the property is a special benefit. In determining whether land has or has not been damaged the jury should consider whether the market value of the property remaining will be enhanced by the improvement, although other property in the vicinity will be likewise benefited. (*Metropolitan West Side Elevated Railway Co.* v. *White*, 166 Ill. 375.) It is true that general benefits affecting the whole community, whether owners of property along the line of a railroad or not, such as increased facilities for travel, the increasing of population and enhancing the general prosperity are not to be taken into account; but benefits flowing from the proposed improvement which appreciably enhance the market value of the particular tract of land and offset injuries to it are to be considered, for the purpose of determining the ultimate question whether there are damages to the lands not taken."

We are not disposed now to enter upon a discussion of the correctness of the rule adhered to

for forty years, nor do we feel at liberty, even if we were so inclined, to overrule the large number of decisions that would have to be overruled to justify a reversal of this judgment. The judgment is in harmony with the law in this State and is therefore affirmed.

JUDGMENT AFFIRMED.

(3) CARTWRIGHT, J., dissenting:

It is with no little hesitation that I record my disagreement with the decision in this case. I am equally averse to overturning established rules of law and substituting uncertainty for certainty, but cannot concur in what I do not understand to be an established rule for the ascertainment of damages to property resulting from a public use. If my disagreement should amount to a confession of want of perception, it is nevertheless a fact that I have not regarded the decisions as establishing a rule so unfair to the citizen and advantageous to the authority invested with the power to take and damage private property for public use as that the question of damge is to be determined solely by the market value of property, regardless of all the elements and conditions affecting such value.

As I understand the decisions, the rule has been that the property owner may recover for all special injuries to his property so far as they affect its fair cash value, and against such injuries may be set off all such benefits as are special and peculiar to the property; but he is neither entitled to recover for injuries common to the public at large nor chargeable with benefits of that character. Illustrating those injuries to property not taken which he is entitled to prove and for which he may recover the consequent damages are the following:

Loss of use of a spring. *Peoria & Rock Island Ry. Co.* v. *Bryant*, 57 Ill. 473.

All physical injuries and all inconveniences of every character actually produced by the pub-

lic use. *Jones* v. *Chi. & Iowa R. R. Co.*, 68 Ill. 380.

The fact that a portion of a farm is cut off by a railroad. *Galena & Southern Wisconsin R. R. Co.* v. *Birbeck*, 70 Ill. 208.

Separation of wood, water and timber from the balance of a farm. *Chicago & Iowa R. R. Co.* v. *Hopkins*, 90 Ill. 316.

Cutting off a part of a farm from the remainder and inconvenience in reaching a highway. *DeBoul* v. *Freeport & Miss. River R. R. Co.*, 111 Ill. 499.

Injuries arising from inconveniences, such as dividing land as to water, pasture and improvements, although not capable of definite ascertainment; danger of killing stock or injuries to pasture or stock; escape of fire and, generally, all damages reasonably probable from the construction and operation of a railroad. *Chicago, Burlington & Northern R. R. Co.* v. *Bowman*, 122 Ill. 595.

The fact that a farm is put in worse shape for cultivation and pasturage; that there is danger of fire; and all other actual inconveniences. *Chicago, Peoria & St. Louis R. R. Co.* v. *Blume*, 137 Ill. 448.

The separation of buildings from a well. *Illinois Central R. R. Co.* v. *Normal*, 175 Ill. 562.

The increased cost of insurance. *Ind. Ill. & Iowa R. R. Co.* v. *Stauber*, 185 Ill. 9.

The size and shape of the parts in which a farm is divided and difficulty of access to the different parts. *Chi. Terminal R. R. Co.* v. *Bugbee*, 184 Ill. 353.

Danger from fire. *Ill., Iowa & Minn. Ry. Co.* v. *Ring*, 219 Ill. 91.

Danger to stock and loss by fire. *Chi. Southern Ry. Co.* v. *Nolin*, 221 Ill. 367.

Noise and vibration if buildings are near enough to be affected.

The property owner is entitled to prove all injuries of that kind which are special and which affect the cash value of his property. The benefits that may be set off against such damages are

such as accrue to the particular property and are not common to property generally. "The constitutional provision is equally mandatory that property shall not be damaged for public use without just compensation as it is that it shall not be taken for such use without just compensation." (*Washington Ice Co.* v. *City of Chicago*, 147 Ill. 329.) It is true that other property in the vicinity may also be specially benefited in the same manner as in the case of a region where the lands are underlaid with coal of no value without facilities for transportation of which *Eldorado, Marion & Southwestern R. R. Co.* v. *Everett*, 225 Ill. 529, is an example. So also numerous farms or pieces of property may be severed into different parts and injuries be of the same character and special as to each piece of property. The special benefits must affect the property directly and proximately and increase its actual value, and, the court having uniformly laid down these rules and sustained instructions to juries stating them, it would be inconsistent to require the jury to forget it all, disregard the exclusion of general and public benefits, and determine the issue upon the single, bare question whether the property would sell for as much after the construction of the improvement as before it, which necessarily includes all common and general benefits. The only consistent rule is that the jury shall take into account special injuries and benefits affecting the fair cash value of the property, and if the damages exceed the benefits, award to the property owner the difference.

This rule, according to my understanding, applies to all cases. In this case damage was claimed to property by the occupation of a public street with an elevated railroad. There were two classes of rights in the street, the one, the public right to use the street for travel and for that only; the other, the right of the property owner of ingress and egress, use in connection with his property and the appurtenant ease-

ments. If there was an obstruction to the public use for travel by the iron pillars, there could be no recovery by the owner for consequent damage, but if his right of access was impeded or interfered with or his property rendered less valuable on account of noise, vibration or other natural consequence of the construction and maintenance of the road, the damage resulting was special to that property. The thing would be a nuisance if there were no authority of law for its construction and operation, and whenever an act is done which without statutory authority would be a nuisance, the owner of property affected by it sustains a special and peculiar damage different from that sustained by the public in general and may have his action for damages resulting from his individual and distinct right. (*Rigney* v. *City of Chicago*, 102 Ill. 64.) In this case there was a direct physical disturbance of a right enjoyed in connection with the ownership of property, and if there was any damage by reason of the disturbance of the right it was special. Against any such damage general benefits to the public, although enhancing the value of the property in question in common with other property in the vicinity could not be considered. To say that the only test is the market value of the property before and after the improvement, regardless of causes affecting the value, necessarily charges the owner with benefits which this court has repeatedly held could not be done, and makes the owner contribute to a liquidation of special injuries his share of the general benefits derived from the construction and operation of the road. I have understood the oft-repeated declaration that damages are to be based upon actual cash values or necessarily implying a consideration of legitimate elements of damage and benefit and a conclusion therefrom.

(4) Assignment of Errors and Prayer for Reversal.

Considering themselves aggrieved by the final decision of the Supreme Court of Illinois in rendering judgment against them in the above entitled cause, the said E. L. Brand, Jr., and E. Belle Brand Atwell, as surviving executors of the estate of Edwin L. Brand, deceased, hereby pray a writ of error from the said decision and judgment to the United States Supreme Court and an order fixing the amount of the bond to be given in this behalf.

And the said E. L. Brand, Jr., and E. Belle Brand Atwell, as executors of the estate of Edwin L. Brand, deceased, plainiffs and appellants in said suit and petitioners herein, assign the following errors in the record and proceedings of the said cause, viz.:

1. The Supreme Court of Illinois erred in affirming the said judgment of the Appellate Court of Illinois.

2. The said Supreme Court erred in not reversing said judgment and in not remanding the said cause to the said Superior Court of Cook County for a trial on the merits.

3. The said Supreme Court erred in deciding that there was no evidence of damage in the case.

4. The said Supreme Court erred in deciding that the claim of damages to the property of plaintiffs was subject to an allowance of benefits, if any, arising from the elevated railroad or improvement in question, taken as a whole, or from the conveniences or facilities furnished thereby.

5. The said Supreme Court erred in not holding that Section 9 of the Eminent Domain Statute of

Illinois, namely, Chapter 47 of the Revised Statutes of Illinois, constituted a guaranty against any such allowance for benefits from the said improvement or elevated railroad.

6. The said Supreme Court erred in denying the claim of appellants that the said judgment of the Appellate Court was an impairment of contract and contrary to the "First" paragraph of "§10" of "Article 1" of the Constitution of the United States, providing that "No state * * * shall pass any * * * law impairing the obligation of contracts."

7. The said Supreme Court erred in denying the claim of appellants that the said judgment of the Appellate Court constituted a deprivation of appellants of their said property without due process of law, contrary to "§1" of the Fourteenth —"XIV" —Amendment to said Constitution, which provides: "Nor shall any state deprive any person of life, liberty or property without due process of law."

8. The said Supreme Court erred in denying the claim of appellants that the said judgment of the Appellate Court is in conflict with and contrary to the provision in said last quoted section, which provides: "Nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws."

9. The said Supreme Court erred in denying the claim of appellants that the said judgment of the Superior Court of Cook County, which was so affirmed by said Appellate Court judgment, was and is in conflict with each of the constitutional provisions set forth in the above assignments of error Numbers 6, 7 and 8.

10. The decision and judgment of the said Supreme Court constitute (a) an impairment of the

contract rights of appellants as owners of the property, contrary to said "First" paragraph of "§10" of "Article I" of the Constitution of the United States; (b) a deprivation of appellants of their said property without due process of law, contrary to said "§1" of Fourteenth—"XIV"—Amendment to said Constitution; and (c) a denial to plaintiffs under said last named constitutional clause of "the equal protection of the laws."

11. The said decision and judgment of the said Supreme Court and the said decision and judgment of the said Appellate Court affirmed thereby, and the said decision and judgment of the said Superior Court so affirmed in said Appellate Court, constitute an infringement of the rights of the appellants guaranteed to them by which the Illinois Constitution (a) under "§2" of "Article II" thereof, which provides that "no person shall be deprived of * * * property without due process of law: (b) under "§13" of said "Article II", which provides that "private property shall not be taken or damaged for public use without just compensation;" and (c) under "§14" of said "Article II," which provides that "no * * * law impairing the obligation of contracts * * * shall be passed.

For which errors the said E. L. Brand, Jr., and E. Belle Brand Atwell, as surviving executors of the estate of Edwin L. Brand, deceased, pray that the said judgment of the Supreme Court of Illinois rendered in the above cause on February 20, 1913, be reversed and a judgment rendered in favor of the said appellants, and for costs.

HARRY S. MECARTNEY,
Counsel for E. L. Brand, Jr., and E. Belle Brand Atwell, as Surviving Executors of the Estate of Edwin L. Brand, Deceased.

(5) Statement of the Case and of The Rule of Law Complained Of.

This is a case which arises out of an attempt on the part of the owners of property abutting upon a street in Chicago in which there was constructed an elevated railroad, to secure damages which they allege were caused to that property by the construction, maintenance and operation of the railroad.

The Constitution of the State of Illinois provides that private property shall not be taken *or damaged* for public use without just compensation, the words "or damaged" being added to the Constitution of 1870 because the Supreme Court of Illinois had intimated that the words "property taken," as they appeared in the former constitutions of the state, did not necessarily include damage to property abutting on a street, by reason of the interference with easements of egress, light and air, enjoyed in common with the public, especially where the fee to the streets was not in the abutting owner, as is usually the case in Illinois. (See cases cited—*Chicago* v. *Taylor*, 125 U. S. 168.)

And the Illinois Legislature in 1872 passed the present Eminent Domain Act under said section of the Constitution, the ninth section of which act is as follows:

> "View of Premises—Verdict.) Sec. 9. Said jury shall go upon the land sought to be taken or damaged, and after hearing the proof offered make their report in writing, so as to clearly

set forth *and show the compensation ascertained to each person thereto entitled.* PROVIDED THAT NO BENEFIT OR ADVANTAGES WHICH MAY ACCRUE TO LANDS OR PROPERTY AFFECTED SHALL BE SET OFF AGAINST OR DEDUCTED FROM SUCH COMPENSATION IN ANY CASE."

There was but one witness, who testified the property in suit was worth as much after the construction and operation of defendant's railroad in the street immediately in front of the property as before. On this plaintiff rested and the court instructed the jury to return a verdict for defendant.

Counsel for plaintiffs in error says all other questions on appeal are waived so as to present only one question, which he states as follows:

> "That in considering the effect upon the premises in question of the railroad structure in question, the jury must exclude from consideration the enhancement in value of the property in question, if any, resulting from the facilities furnished by the improvement. And that to exclude them as property owners from sharing in the local market benefit arising from the improvement as a whole is *per se* to deny them the equal protection of the law."

And further elucidates in these words:

> "In order to make the case a test one as to the chief question involved, the plaintiff filed certain withdrawals of error in the Appellate Court, leaving open substantially this one question, that in considering the effect upon the premises in question the jury must exclude from consideration the enhancement in value of the property in question, if any, resulting from the facilities furnished by the improvement. It was this proposition of law which the Appellate and Supreme Courts of Illinois each denied in their several decisions and judgments."

In other words, he assumes that he attempted to or did show by proper evidence, or that there is a legal presumption that there was a distinct market value added to his and other property affected by the whole improvement of the construction and operation of the railroad, which was in effect set off by the court in directing the verdict, contrary to said Section 9. There could be no presumption, legal or otherwise, that the construction and operation of defendant's railroad conferred a distinct increase of market value on plaintiff in error's property and all other property affected by the improvement. Even counsel himself negatives this idea by stating the jury must exclude the general enhancement, *if any*, so that it comes directly to what is shown by the record to see if plaintiff in error has been injured, contrary to the safeguards of the Federal Constitution.

While we discuss later the law and decisions of Illinois showing the interpretation placed on the words "or damaged," and on the proviso of Section 9, to have been consistent from the earliest times and to be the same now as it was when plaintiff in error purchased the property, still we think it necessary to an intelligent understanding of the question as stated by counsel and the record thereon, to briefly give the interpretation of the proviso of Section 9 as defined by the Illinois Supreme Court.

That Section 9 was first construed in the case of *Page* v. *C. M. & St. P. Ry.*, 70 Illinois 324, contrary to statement of counsel that that case was not under the 1872 Act, we refer only to the words of the court itself in the opening of the opinion (p. 325):

"Upon the trial it was shown that the line of appellee's road crossed that of the Atlantic and Pacific Railroad * * * at the northwest corner of the tract, and evidence was introduced by appellee under objection, that with the crossing at that point, the whole 40-acre tract was worth more on account of the location of appellee's road across it than it would be without the road. * * * (page 326) Objection is taken to the admission of such testimony * * * as being in violation of the now existing rule under the Statute of 1872, that no benefits or advantages shall be set off against or deducted from, the compensation to be given for land taken or damaged."

This Page case is the first case coming before the Supreme Court of Illinois, in which the question of the construction of Section 9 of the Eminent Domain Act was put squarely before the court and was recognized by the court as being before it. The only question in the case involved the consideration of said act.

The case of *Railway* v. *Francis,* decided earlier at the same term, was confined to a discussion of what was meant by the words "or damaged," as added to the 1870 Constitution, the court deciding that such damages must be *real* and *substantial* and if the property was worth as much or more with the improvement as without it, there could be *no damage* as contemplated by the Constitution. The effect, if any, of Section 9, was not discussed.

But in the Page case, the court considered what were the benefits or advantages which were not to be deducted under Section 9, and decided that they were those mere general and public benefits or increase of value received by the land in common with

other lands in the neighborhood, and said that the rule of law was correctly stated as follows (page 329):

> "In case of a railroad appropriation for a right of way through a tract of land, causing incidental and local injury to the residue of the tract, although general resulting benefits from the railroad to the value of such residue of the land, cannot be taken into account in estimating the amount of compensation to be paid the owner; yet, where local and incidental benefit to the residue of the land is blended or connected, either in the locality or subject-matter with the local, incidental injury to such residue of the land, the benefit may be considered in fixing the compensation to be paid the owner, not by way of deduction from the compensation but of showing the extent of the injury done the value of the land."

From the law as thus stated, the Page case holds that a partial effect only is not to be considered, but the whole effect and the effect not upon any part of the tract, but upon the whole tract; that this is not deducting benefits or advantages from damages, but is ascertaining whether there be damage or not; stating this is but an estimation of damage, and seems the only fair and just mode of estimating it; and fruther, after stating that evidence of a depot location went to the question of special benefits and not those benefits meant by Section 9, that under such evidence:

> (Page 328.) "If the market value of the tract will not be diminished by the construction and operation of the road, the land cannot be said to be damaged thereby."

And following the language of the Page case, as the court pointed out in the Stickney case (150 Ill.

362), they have consistently held to the interpretation of the "benefits or damages accruing to the property affected," mentioned in Section 9, as intimated in the Page case, and as more definitely stated in the subsequent cases and in the Stickney and this Brand case, as being those general intangible benefits flowing generally to the public from the construction of an improvement; that these benefits flowing from the improvement as a whole, and those going to the entire community, are usually difficult or impossible of ascertainment and are speculative, and that they should not be considered in any case. That was what the legislature meant when they put the proviso in Section 9, in order that all attempts to introduce evidence of these general resulting benefits to reduce the damages claimed might be excluded, on authority.

Plaintiff's counsel's real objection is not that Section 9 has been ignored, but that it has not been, as he believes, correctly construed. He believes there is a general benefit expressed as a local market increase in value, which accrues to property generally from the construction of the improvement, although this is based on an assumption rather than on proof, not only in this but in all the other cases he cites. The fact that the Illinois Supreme Court, in construing Section 9, has held that that general benefit or increase of market value due to the improvement as a whole is a speculative, intangible thing, and defined as special benefits whatever gives specific added value to the property, which is capable of being expressed in dollars and cents, is what he objects to.

As Justice FARMER, in delivering the opinion of the court in this Brand case, said (T. Rec., 130):

> "The conflict between the decision and the decisions of other states relied upon by appellants is not so much as to the rule of law as it is to the application of the rule. This court is in accord with cases in other states holding that only special benefits are to be considered in making just compensation for land damaged by, but not taken for, public use. The difference is principally as to what are general benefits and what are special benefits."

And the court has held in its numerous decisions that merely because other property along the line of the improvement has been appreciably affected and enhanced in money value, that each of such pieces are specially benefited within themselves by the construction and maintenance of the improvement, and that such increase does not measure the general benefits or advantage accruing to property affected, which must be excluded.

A careful examination of the cases clearly shows that there has never been an attempt on the part of the party seeking damages, through evidence introduced or offered, to put into the realm of the actual and concrete, these general benefits or advantages accruing to the property affected, from the improvement, which are not to be deducted; the condemnors have at least twice (as in the Henry and Washington Ice cases discussed, *infra*) attempted to show these general benefits in an effort to reduce the damages, but these attempts were because of the plain language of Section 9 unsuccessful.

Broadly speaking, plaintiff in error's contention, supposing that his record is in proper shape to

raise the question, is that the effect of the rule allowing all that enhances the specific value of the property appreciably, to be set off as a special benefit, is a denial of just compensation. His argument being that while the constitution refers to property damaged in order to cover abutter's cases, theoretically there is an actual taking, within the meaning of the constitution, of something that was of value to the property, away from it; and that therefore the loss of that valuable thing should be made good to him in the same way that the loss of a piece of property actually taken is made good to the owner in awarding him compensation.

Our answer is that benefits are not allowed to be set off against the value of the part actually taken, because that part is completely lost to the owner. They are allowed to be set off against the damages to the remainder in the estimation of the just compensation to be paid to him for the exercise of the Eminent Domain right, because to compensate means to make whole, as Mr. Lewis says (page 1174):

> "A fair and full equivalent for the loss sustained by the taking for the public use."

Now, in the case of the land taken there is an actual loss to the property owner of the part taken, he has it no more. In the case of the remaining property, the property is still there, belonging to the original owner, and if he still suffers any real or substantial loss by reason of the taking of a part, that is, if his remaining tract is less valuable or less usable, this loss must be made good to him or he does not receive just compensation; but certainly, if the remaining part which he still holds is just as

valuable to him because of other uses or added uses or different uses to which it may be put because of the fact of the construction of the so-called improvement, which other or different uses render the property of equal or greater value than what it would have been as part of the whole without the improvement, surely just compensation does not require that he be paid anything, because he has suffered no loss.

The same is true, even though the interference with the street easements be considered as the taking of some of the property over which the abutter had dominion. If the loss or interference with the particular easement has left him with just what he had before and with such added or different use conferred upon the property through the taking, that that loss cannot be measured, and through the uses to which his property is still capable of being put, his property is as valuable or more valuable than ever, he has suffered no loss and just compensation would not require the payment to him of anything. The interference with his intangible easements is a mind loss rather than a real one. It seems to make little difference from a practical point of view whether the interference with the easements be considered a taking or a damage, the result is exactly the same.

Just compensation must mean the replacement of that taken, or of that loss inflicted, in money value. In no other way could compensation be made and if his property, after the so-called taking, is as valuable to the owner as it was before, nothing of value has been taken from him.

It seems that this bears all the ear-marks of common sense and reason, and what more is law? The

judges of the Illinois Supreme Court in all their various decisions have shown that when it came to the question of considering just compensation for damage inflicted, whether it be to the remainder of a tract or to abutting property for an interference with some easement, or the taking of an easement as property, if we choose to call it such, that the rational and only just point of view to take was to consider whether anything measurable in money had been taken from the owner, that is whether any real or measurable loss had been occasioned. As they have said repeatedly, if what a man had after the taking and payment for the actual thing of which he was deprived, when measured in money, the only means of measuring it, was worth as much to him as before, how could he have suffered a loss, and this view seems to have been in the mind of the Illinois Supreme Court since the first cases for the determination of just compensation under the exercise of right of eminent domain were before the court, and undoubtedly led to the statement that justice demanded that what are now known as general benefits must be defined as those intangible and speculative advantages which may flow from the improvement, but which, being incapable of practical ascertainment, should not affect the mind in determining whether the party whose property was taken or whose property was damaged had suffered any loss.

It will be noted that the Illinois Supreme Court has consistently held to the main idea that just compensation for property damaged necessitated a consideration of all the real, tangible elements of damage, loss or injury as well as of benefit or advan-

tage and the exclusion from consideration of all intangible, speculative and imaginary elements of injury or benefit. And they have, to carry out the idea that just compensation means payment to the owner of what he has been deprived of, and that he be not paid more than what will make him whole, and thus in effect, take property from the condemnor without compensation to him, declared the former to be special damage or benefits and the latter general damage or benefits. Thus, special benefits have always been allowed consideration in ascertaining whether there be damage or loss, where the thing taken has not been actually lost or taken away from the owner, and the general benefits have always been excluded under the various Eminent Domain laws of the state, except possibly for a short period while the 1845 Act was in force.

The practical effect of what plaintiffs in error contend for would be to allow speculative and imaginary damage, that is for a loss which he did not in reality suffer, and a loss which could not be measured as to him, with justice to the comdemnor, and this court itself, in *Chicago* v. *Taylor*, 125 U. S. 161, and in *Osborne* v. *Missouri Pacific Ry.*, 147 U. S. 248, in discussing the 1870 Constitution of Illinois and the Eminent Domain Laws of the State, refers approvingly to the Illinois Supreme Court's view that a recovery might be had wherever private property had sustained a *substantial* injury, and in the Taylor case, the language "*that the real question is, has the value of this property been diminished by the construction of this viaduct,*" was approved.

(6) POINTS.

I.

THE RECORD DOES NOT PRESENT THE ONLY QUESTION PRESSED ON BEHALF OF PLAINTIFF IN ERROR.

There was no evidence offered that the construction and operation of the railroad in question conferred any benefit or advantage on the property affected, either general or special, and no presumption to that effect exists.

II.

THERE HAS BEEN NO CHANGE IN DECISION BY THE ILLINOIS SUPREME COURT IN THE CASE AT BAR ANNOUNCING A RULE OF LAW AND OF PROPERTY DIFFERENT FROM THAT IN FORCE PRIOR TO THE PURCHASE OF THE PROPERTY IN QUESTION BY PLAINTIFF IN ERROR, AND THE CASE AT BAR IS NOT WITHIN THE DOCTRINE OF THE CASE OF MUHLKER V. HARLEM, ETC., R. R. CO., 197 U. S. 544.

The State of Illinois v. *John Evans*, 3 Illinois Reports 208.

The Alton & Sangamon R. R. Co. v. *William Carpenter*, 14 Illinois Reports 189.

The People ex rel So. Park Commissioners v. *Erastus S. Williams*, 51 Illinois Reports 63.

Hayes v. *Ottawa, Oswego & Fox River Valley R. R. Co.* 54 Illinois Reports 208.

Chicago & Pac. R. R. Co. v. *Francis*, 70 Illinois Reports 238.

Page et al. v. *Chicago, Mil. & St. P. R. R. Co.*, 70 Illinois Reports 324.

Eberhart v. *Chicago, Mil. & St. P. R. R.* 70 Illinois Reports 347.

Chicago & Pac. R. R. Co. v. *Stein*, 75 Illinois Reports ~~126~~ 41

Emerson v. *The Western Union R. R.*, 75 Illinois Reports 176.
Keithsburg & Eastern R. R. Co. v. *Henry*, 79 Illinois Reports 290.
St. Louis, Vandalia & Terre Haute R. R. Co. v. *Haller*, 82 Illinois Reports 208.
City of Elgin v. *Eaton*, 83 Illinois Reports 535.
Village of Hyde Park v. *Dunham*, 85 Illinois Reports 569.
Chicago, Milwaukee & St. Paul R. R. Co. v. *Hall*, 90 Illinois Reports 42.
St. Louis, Jerseyville & Springfield Ry. Co. v. *Kirby*, 104 Illinois Reports 345.
McReynolds v. *Burlington & Ohio R. R. Co.* 106 Illinois Reports 152.
Chicago & Evanston R. R. Co. v. *Blake*, 116 Illinois Reports 163.
Concordia Cemetery Assn. v. *The Minnesota & N. W. R. R. Co.*, 121 Illinois Reports 199.
Chicago, Burlington & Northern R. R. Co. v. *Bowman*, 122 Illinois Reports 595.
Kiernan v. *The Chicago, Santa Fe and California Ry. Co.*, 123 Illinois Reports 188.
Harwood v. *City of Bloomington*, 124 Illinois Reports 48.
Chicago Peoria & St. Louis Ry. Co. v. *Aldrich*, 134 Illinois Reports 9.
Washington Ice Co. v. *City of Chicago*, 147 Illinois Reports 327.
Metropolitan West Side Elevated Ry. Co. v. *Stickney*, 150 Illinois Reports 362.
Metropolitan West Side Elevated Ry. Co. v. *White*, 166 Illinois Reports 375.
Peoria, Bloomington & Champaign Traction Co. v. *Vance*, 225 Illinois Reports 270.
Eldorado, Marion & S. W. R. R. Co. v. *Everett*, 225 Illinois Reports 529.
Brand v. *Union Elevated Ry. Co.*, 258 Illinois Reports 133.

III.

WHEN PARTIES HAVE BEEN REGULARLY HEARD IN THE REGULAR COURSE OF JUDICIAL PROCEEDINGS, AN ERRONEOUS DECISION OF A STATE COURT DOES NOT DEPRIVE THE UNSUCCESSFUL PARTY OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW. THE STATUTE NOT BEING ATTACKED FOR UNCONSTITUTIONALITY, THIS COURT WILL NOT DISTURB THE STATE SUPREME COURT'S INTERPRETATION OF THAT STATUTE, NOR HARMONIZE ITS DECISIONS IF THEY ARE CONFLICTING.

Willoughby v. *City of Chicago*, decided November 16, 1914, by this court.

Sauer v. *New York*, 206 U. S. 536.

Moore v. *Electrical Co.*, 234 U. S. 619.

Central Land Co. v. *Laidley*, 159 U. S. 103-111-112.

Head v. *Amoskeag Mfg. Co.* 113 U. S. 9-26.

Morley v. *L. S. & M. S. Ry. Co.*, 146 U S. 162-166-7.

Merchants & Mfrs, Bank v. *Penn*, 167 U. S. 461.

Backus v. *Fourth Street Union D. Co.*, 169 U. S. 557-566-571.

ARGUMENT.

I.

THE RECORD DOES NOT PRESENT THE ONLY QUESTION PRESSED ON BEHALF OF PLAINTIFF IN ERROR.

We state now, and wish to be emphatic, that the record is bare of any evidence or any attempt to introduce any proper evidence that there was any local market benefit arising from the establishment of the improvement in question.

The decision of the *nisi prius* judge specially pointed out that there was no evidence before him of any benefit or advantage accruing from the construction and operation of defendant's railroad, the deduction of which should be considered, the *nisi prius* judge saying: (Trans. Rec., 109):

> "Although the value has not advanced, it has not been proven by the evidence, and there is no evidence tending to prove, it did not advance by reason of the erection of this structure; *non constat* that the structure was erected, there may have been many reasons that the value of the property did not advance, and the only affirmative evidence in the case is, that immediately before the erection of the structure the price was so much and that immediately thereafter the price was so much. There is no evidence of depreciation at all. There is no

> evidence of lack of appreciation which depended upon the erection of the structure, and therefore I think you have not made out a case."

Counsel for plaintiff in error may think that the question he seeks to have determined is properly raised in the record. He refers to the record as though it were. In order that there may be no doubt in the mind of this court on this question, we take the liberty, first of stating the specific objections on this point, brought to the attention of the court in his motion for a new trial, and by which he must in all events be bound, and to go further, we will secondly show that nowhere in the record was any proper attempt made to show by the witness any or what benefit or advantage or market value accrued to the property affected by reason of the construction and operation of the railroad in the street immediately in front thereof.

In the motion for a new trial, the first ground is that evidence was refused tending to show the service and travel conveniences on the Illinois Central Railroad immediately before the construction of defendant's elevated structure, and the question on this point was, (T. Rec. p. 111):

> "In order to make the record I will ask you approximately how frequently trains ran on the Illinois Central suburban service, both express and local, at that time."

The next objection on this point was that evidence was not admitted of the values of property on Michigan avenue and Van Buren street immediately or shortly before the construction of defendant's railroad, and also as to such values of property on

State street a block away and the specific questions in regard to this set forth are (T. Rec. p. 112):

"Q. Were you familiar with the character and value and of rents generally in Michigan avenue opposite this block in question, the corresponding block on Michigan—at that time?

Q. Now do you know—I think you have stated, but I will ask you again—the value of Michigan avenue property in the corresponding block east immediately before this structure in Wabash was commenced?

Q. Immediately east, corresponding block between Jackson boulevard and Van Buren street. I will ask you if you know the value of property on the State street block, the corresponding State street block between Jackson boulevard and Van Buren street and west of this property there, immediately before the commencement of the building of the structure in Wabash avenue, just answer yes or no."

Q. Then I will make the question read this way: What was the valu[illegible]

These are the only questions which are set up in the motion for a new trial, refusal of answers to which is complained of as error and the answers to which counsel for plaintiff in error contends would show a benefit or advantage which accrued generally to the property affected by reason of the construction and operation of defendant's railroad.

We submit that even with evidence tending to show that the frequency of the operation of trains on the Illinois Central Railroad had an immediate effect and gave a distinct value to the property in question, this could not tend to prove the effect of the elevated railroad on the value of the property.

We further submit that without evidence tending to show properties in the adjoining blocks on State

street, Michigan avenue or any other adjacent street were of the same general kind and character as that of the property affected, and unless there was evidence tending to show that the values of property on said street were directly dependent upon the same factors and conditions as affected the values of the property involved, and in what proportion values were enhanced solely by reason of the construction of defendant's railroad, the answers to the questions propounded would be entirely meaningless and can form no basis for estimating the amount of benefit or advantage which might accrue by reason of the construction and operation of the defendant's railroad to all the property affected or to the property abutting. As the court very aptly, in passing upon the objections to these questions, in addressing counsel for plaintiff in error, says: (T. R. 56.)

> "It seem to me that at the present stage of the case, to interject into the case a trial of the values upon State street and Michigan avenue and other streets not in physical contact with this street itself would not be competent because it immediately raises another issue,—Michigan avenue, the question as to the situation of Michigan avenue."
>
> "The reason for the rise or decrease in valuses along Michigan avenue on State street, the reason for the depreciation or appreciation of values there. It raises different issues and different trials, and it would not necessarily prove or tend to prove the issues in this case."

And as evidence that the court had no intention of barring proper evidence in this record, his ruling was: (T. R. 57):

"For the present then, the objection to this question is sustained."

And, as further evidence of the appreciation of the court of what was involved and of the necessity of evidence to form a basis for the contention of counsel, he allowed counsel to examine the witness on the general character of the business on State street, (T. R. 57.) But the examination of the witness in this regard was not made material by reason of the kind of questions asked and the answers given. In other words, it is not in anyway connected up to the question of the amount of benefit or advantage which accured to these properties by reason of the construction of the railroad by defendant, or that there was any appreciable benefit or local market effect due to defendant's railroad, nor is there any showing anywhere that property on these streets were affected by the railroad.

Again we say, and we wish to emphasize it as emphatically as possible, that the record in the case at bar is bare of any attempt to introduce any evidence tending to show that any benefit or advantage accured to the property affected by reason of the construction and operation of defendant's railroad, nor is there any suggestion as to the amount thereof or any way in which to estimate it.

And, to follow out the second suggestion, we refer again to the transcript of the record and follow the witness's testimony.

The witness testified to the size of the lot, (p. 39) the width of the street, the situation of the property, time when the construction of the railroad

commenced (p. 40), when it was completed, and that trains were operated on the structure (p. 41), the general character of the structure itself, that the trains were operated by coal-burning engines at first, and afterwards by electricity (p. 42), describes the streets upon which the so-called elevated loop was constructed, that there were cable cars on Wabash avenue and cable cars on State street; that Michigan avenue is the first street east of Wabash; that the Van Buren Street Suburban Station on the Illinois Central was about two and one-half blocks from the property in question; that their trains were operated by steam (p. 43). Witness was then asked as to the general character of the service on the Illinois Central.

The court held that it was sufficient to show that there was such service and where the station was, which had been done, whereupon counsel asked his question as to how frequently trains ran on the Illinois Central, to which the court sustained objection. (P. 45.) No further offer of evidence in this connection was made.

Witness continued to testify that prior to the construction of the loop, the terminal of the South Side Alley "L" was at Congress between Wabash and State; that after the construction of the loop, the connection was made from Harrison street up to Van Buren, touching the loop at that point; that the terminus of the Metropolitan "L," prior to the construction of the loop was on Franklin street, between Van Buren and Jackson; that the terminal of the Lake Street "L" was on Market street (p. 45).

Witness then describes the noise, dirt and dust and

vibration caused by defendant's elevated structure in question; stating it had an effect upon the hearing in the premises and on the light for the ground floor, there being more dirt and noise on the second. (P. 46.) That traffic on Wabash avenue in front of the premises is blocked on account of the uprights, it being almost impossible for two trucks to pass on twenty feet if they have a load. (P. 47.) That there were some ashes from the engines in the operation of the trains, and that the structure interfered with carriage trade. (P. 47.) Witness then discusses the character and grade of business on Wabash avenue adjoining property in question, and the rentals received from property (p. 48-49), rents being seventy-five hundred dollars a year before the construction of the railroad (p. 50) and then the building was remodeled to some extent (p. 51) and that by May, 1900, the rentals were eighty-four hundred ($8,400) a year. (P. 55.) Witness was acquainted immediately before construction, with the various property in blocks adjoining that in which the property in question was located, and observed the rents of properties there. Witness was then asked if he was familiar with the character and value of rents generally in Michigan avenue opposite the blocks in question. The court sustained objection. (P. 57.) No further offer of what it was desired to prove was made. Witness then testified to the general character of business conducted in Michigan avenue and in State street in the corresponding blocks, and then stated that the value of the property in question was forty-eight hundred dollars a foot before the construction of the railroad, and that im-

mediately thereafter the value was the same (p. 59); that the value continued the same until about 1902. (P. 60.) The witness was not asked whether he considered any added market value arising from the improvement as a whole in giving his opinion of the value after and the inference is that if there was any such, that he excluded it. Witness was then asked: "Do you know the value of Michigan avenue property in corresponding block west, immediately before this structure in Wabash avenue was commenced?" The court sustained objection to the question. (P. 60.)

Witness continued, there was appreciation in rents more or less generally in the real estate market in Chicago in 1898 (p. 61) but does not state that defendant's railroad had anything to do with such increase. Witness was cross-examined as to his employment and general qualifications, as to knowledge of real estate values. (P. 62-89.)

On re-direct, witness went into amount of rentals received from the property in suit (pp. 90-91) and stated there was a physical effect in the way of noise on account of trains passing around the curve on the elevated structure, but no special effect that was not present from the trains passing in front of the property. (P. 92.) There is the darkening of the street, dirt and noise, principally noise. Witness corrects his testimony that Jackson boulevard was a boulevard for about fourteen years, that he believed it was an ordinary market in 1897, but in 1898 there was a boom in rents, as he remembers at the time, where they did not have long leases he was trying to get more rents. (P. 93.)

Witness then testifies to the sale of the property next door to the property in suit (pp. 94-5) and witness generally paid the taxes. (P. 96.) Property had not increased in value from 1893 to 1897. There was a panic on then. Property maintained its value as far as the actual value of the property goes, though rents were lower. (P. 97.)

We submit the foregoing contains all the essential points of the only witness' testimony, and we challenge counsel for plaintiff in error to point out wherein it was sought to show by the witness that the construction and operation of the railroad in the street in front of the property conferred any benefit or advantage on the property which could be in anyway estimated so as to be eliminated from consideration in arriving at the amount of just compensation which should have been awarded.

Counsel for plaintiff in error has made the statement that without going into the question of showing prevailing transit facilities and movements of passengers before and after the improvement, for the purpose of arriving at an estimation of the damage under the rule he contends for, that it is possible to arrive at it by showing the value before the improvement, the value after the improvement and then the value after, with all conditions the same except that the structure be considered as removed from in front of the property; but even on this theory, if it were a proper one, which we do not by any means concede if only for the reason that it would include all elements of damage and benefit, whether proper or improper, the witness was not examined along these lines, and there is no testi-

mony either introduced or offered on this theory. There is not even any evidence as to the purpose of the elevated railroad, whether to carry passengers, freight or express, nor what travel there was upon it, nor whether more people than formerly were brought to the property or neighborhood. Therefore, we submit that on the simple statement of plaintiff's own case, the *nisi prius* judge was right when he said that there was no evidence tending to prove that the property did not advance by reason of the erection of this structure; that there is no evidence of depreciation at all and no evidence of lack of appreciation, which depended upon the erection of the structure, and that therefore a case had not been made out.

At the risk of being tedious, but in order to be emphatic, we again repeat from counsel's statement as to what this case is about:

> "In order to make the case a test one as to the chief question involved, the plaintiff filed certain withdrawals of error in the Appellate Court, leaving open substantially this one question, that in considering the effect upon the premises in question the jury must exclude from consideration the enhancement in value of the property in question, if any, resulting from the facilities furnished by the improvement. It was this proposition of law which the Appellate and Supreme Court of Illinois each denied in their several decisions and judgments."

What we have tried to show in our foregoing statements, is that on the record as presented there was no enhancement in value of the property in question resulting from the facilities furnished by the improvement shown or endeavored to be shown by the evidence, which the jury should have excluded, had

the case gone to the jury, or which the court failed to exclude in directing a verdict. Counsel examined his own witness and asked him the value before the construction of the railroad and the value after, and he certainly cannot be heard to complain that his own witness included illegal elements of benefit or advantage to the property in his estimation of the value after, if the witness did in fact so include illegal elements of benefit.

This is a fallacy into which Justice Cartwright, in his dissenting opinion, falls, because he assumes that in the case at bar the rule was announced that the only test was the market value of the property before and after the improvement, and he shows this by stating that "To say the only test is the market value of the property before and after the improvement, regardless of causes affecting the value, necessarily charges the owner with benefits, which this court has repeatedly held could not be done."

We submit that no such rule forms the basis of the opinion of the majority of the court, and that that is not the rule which has been laid down in Illinois and constantly adhered to. The court has time and again held that the damages are to be based upon a consideration of all the *legitimate* elements of damage and benefit, and a conclusion therefrom; that special benefits may be considered in among the total effect, but on account of said Section 9 general benefits may not be.

The statement that if the value is as great after the improvement as before there is no damage and no recovery can be had surely is the only possible statement to be made in deciding a case where the record is bare of any evidence of special or general benefits which must or must not be considered, as the case may be.

II.

THERE HAS BEEN NO CHANGE OF THE LAW IN THE DECISION BY THE ILLINOIS SUPREME COURT IN THE CASE AT BAR, ANNOUNCING A RULE OF LAW AND OF PROPERTY DIFFERENT FROM THAT IN FORCE PRIOR TO THE PURCHASE OF THE PROPERTY IN QUESTION BY PLAINTIFF IN ERROR.

The proviso of Section 9 of the Eminent Domain Act is but a restatement of the same general provision which has been in all the laws on the subject in the State of Illinois from the time of the first act of the legislature in 1833, as it is not plain the act of 1845 intended that general benefits which had already been defined by the courts as intangible and speculative should be included. Being speculative they were not to be included in any case.

The original Eminent Domain Statutes of the state, as found in the Revised Laws of 1833, page 535, and Revised Statutes of 1839, page 350, provided expressly: "That the assessors should assess the damages which they shall believe such owner or owners will sustain, over and above the additional value which said lands will derive from the construction of the road, provided the said commissioners shall not estimate any benefit or advantages which may accrue to lands affected in common with those adjoining lands on which such road, etc., does not pass."

The Act of 1845 provided that damages for the

taking of land should be limited to those sustained in excess of the additional value which such lands shall derive from the construction of such public work.

The Act of 1852 provided:

> "The Commissioner shall take into consideration and estimate the benefits and advantages to the parties resulting from the use and construction of the road, etc., or other improvement;
>
> Provided the said commissioners shall not estimate any benefits or advantages which may accrue to lands affected in common with those adjoining lands on which such road, etc., does not pass."

The Act of 1872, as has been said, provided that no benefits or advantages which may accrue to lands or property affected, shall be set off against or deducted from such compensation in any case.

The first case in Illinois upon this subject arose in 1840, being that of *State* v. *Evans,* 3 Illinois 208. The question was, what damage was Evans entitled to by reason of the construction of a railroad over his land? The court said (p. 211):

> "In justice and in law, he should receive full compenastion, the measure of which would be not merely the value of the land of which he has been deprived, but also all damage which may result from the appropriation and use of his land."

The *nisi prius* court decided,—

> "That the supposed enhanced value of the land by the location of the road was not to be taken into account."

And the Illinois Supreme Court said this was a correct view of the law. It will be noted that even in this early case, the so-called general benefits were referred to as uncertain and speculative, by calling them "The *supposed* enhanced value of the land."

And we find very positive proof of the continuity of the views of the Supreme Court of Illinois, to the effect that all that gives direct enhancement in value to the property, capable of definite measurement is a special benefit and that the general benefits contemplated in the various statutes are of an intangible speculative nature, in the early case of *Railroad* v. *Carpenter,* 14 Illinois 189, where the court say, after reciting the provisions of the Act of 1833-1835, that the Commissioner shall not estimate the benefit or advantage which may accrue to the lands affected in common with those adjoining lands on which such road does not pass. (P. 190).

> "It is obvious, from these various provisions of the statute, that the legislature never contemplated the payment of damages to the owner of a tract of land for the privilege of constructing the railroad through it, when the additional value to be given to the land by its construction was fully equal to the injury which it would occasion. If additional value is given to the land by the construction of the public work, it matters not whether it be by draining the land which was before wet, by affording additional facilities for taking its produce to market, or by the general enhancement in the value of the land occasioned by its contiguity to the public work. The language of the statute is general, and there is no propriety in restricting the benefits to be derived from the construction of the railroad, if of a real and substantial character, to such only as arise from a particular source, or for

confining them to one class of benefits more than another. It is immaterial how the owner of the land is benefited, or that others whose lands are not entered upon are benefited to an equal or even greater extent. It is enough that the value of his land is enhanced by the construction of the railroad through it, and he has no right to complain that the enhancement is not peculiar to him alone. It might as well be insisted that the increased value given to a marsh not before tillable, by cutting a canal through, so as to drain it, should not be taken into consideration in estimating the advantages which the owner of such marsh would derive from the construction of the canal, as that the construction of a railroad and the additional value given to land along its immediate line should be excluded in estimating the advantages of such road to the proprietor. One is as much a real benefit as the other."

In the case of *People* v. *Williams*, 51 Ill. 63-68, it is said:

"It has been held by this court that benefits may be the compensation contemplated by the constitution. *State* v. *Evans*, 2 Scam. 208, and subsequent cases, thus paying for the use by the benefits conferred upon the owner by the contemplated improvement. However unreasonable and unjust this may seem to be, it is the law of this court."

This was under the 1845 Act.

The Act of 1852 seems to have been first construed in the case of *Hayes* v. *Railroad*, 54 Ill. 373. This is the statute the court will recall counsel for plaintiffs in error insists repealed the unjust statute of 1845, and he cites it.

We call the attention of the court to the case because it clearly shows that, even under the statute

of 1852, which is in effect the same as Section 9 of the 1872 Act, the Supreme Court of Illinois flatly held that in estimating the damages by reason of the construction and use of the road, that benefits and advantages could be set off or deducted from the compensation for land damaged, although they could not be deducted and set off from the compensation to be awarded for the land actually taken.

Following this case, the Supreme Court again had the Act of 1852 under consideration, in *Emerson* v. *Railroad,* 75 Ill. 176, in which the question of special and general benefits was directly considered. In that case, the following instruction was offered and given by the court, with the modification stated, and the Supreme Court held it to correctly state the law.

The instruction offered was (page 179) that:

> "In assessing the damages to the land affected but not taken by the railroad, true measure is the difference, if any, between the market value of said land with the road as it is and what such market value would have been if the railroad had not been built across the lands so affected, and that without estimating any benefits or damages, real or supposed, to such tracts by reason of the construction of such railroad."

The court added the following modification, which indicates that they had in mind the speculative nature of general benefits:

> "This is so as to compensation for the land actually taken by the railroad company, but in assessing damages to the adjoining land caused by the construction, location, operation and use of said railroad across said lands, the jury should offset against said damages, *any special benefits, if they believe from the evidence any special benefits have been proved,* to said lands or any

tract thereof *over and above what other parties derive from said railroad who own land in the vicinity thereof, but whose lands are not crossed by said railroad.*"

It will be noted that here the court plainly intimated that any enhancement in value to property through which the road passed would be a special benefit.

This brings us to the cases arising under the 1872 Act. Before proceding to an analysis of these cases, we wish to call the court's attention to the fact that counsel for plaintiffs in error's statements in regard to the change in the Constitution of Illinois by the addition of the words "or damaged" to "property taken," has no effect whatever upon these cases. There was no question under the former constitution but what damages were allowed to property not taken, where they were contiguous to the property taken, which is the case in all the cases reviewed, but when it came to the question of the rights of the owners of property abutting on streets, by reason of the fact that in nearly all instances in Illinois the fee of the streets is in the state and the abutting property owners have only an easement as to light, air and access in common with the general public, it was intimated by the Supreme Court that no property was taken within the meaning of the constitution by an interference with those easements through a use of the street for public improvement; and for that reason the words "or damaged" were added to the constitution so as to cover these abutter's cases. And later the court construed the meaning of the added words "or damaged" in the case of *Railroad* v. *Francis*, 70 Illinois 238.

This case was decided in September, 1873, the Constitution was adopted in 1870, it does not, however, appear from the opinion whether the bill in equity filed in that suit was filed after July 1, 1872, when Section 9 of the Eminent Domain Statute went into effect. This is the first case in which the Supreme Court construes the new constitution as to the meaning of the added words "or damaged" in the 1870 Constitution.

Complainant had bought some lots on Bloomingdale avenue, in Chicago, in the belief that a railroad would be built in the adjoining Armitage avenue. The railroad, however, was built in Bloomingdale avenue and complainant said and tried to prove, that his lots were worth less by reason of the road being on Bloomingdale avenue than they would have been worth had the road been in Armitage avenue, but the evidence showed that the property was worth fully as much, if not more, than if the road had not been built at all. The court said the inquiry before them was whether under the constitution of 1870, any damages should be assessed, and they ask what is the meaning of the word "Damage," as used in this connection, and say (page 239):

> "We must presume that it was used in its ordinary sense, which is hurt, injury or loss. Now, we cannot suppose that the framers of that instrument intended it in any other sense than loss or depreciation in the property damaged; that the damage or injury should be real and not imaginary and speculative."

The opinion is quite short, and a little further on, in the opinion (page 240), the court say:

> "This provision must receive a reasonable

> and practical interpretation, but if that contended for by appellee were given, it would become ruinous to such companies, as they would be compelled to pay in damages enough to each property holder whose property was not benefited, to as great an extent as that which is most favorably situated and has been most advanced in value, so as to make them equal."

In this case again is seen the idea present in the mind of the court that the benefits or advantages mentioned in Section 9, which are not to be deducted are those general benefits to the community of an intangible and speculative nature and that whatever gives distinct added value to the property which can be appreciably measured, is a special benefit to that property, and that other property which is likewise appreciably enhanced in value along the line of the improvement is likewise specially benefited by the improvement.

Mr. Sidney Breese, then chief justice, and who had been continuously on the bench since 1840, especially concurred in the opinion, to the effect that when property is not taken the damage must be real, and that the evidence does not show an actual, real present damage to the property.

The next case, decided at the same term of court, being that of *Page* v. *R. R. Co.*, 70 Illinois 324, refers to the Francis case, and it is stated in the opinion that the proceedings in this Page case were had under the Act of 1872, and they set forth Section 9 and the proviso which is under discussion here. The court say (page 327):

> "There is no claim here for any damage, except for the depreciation of the market value of the remainder of the tract by reason of the loca-

> tion of the road, but the evidence shows that this location of the road largely increases its market value. How, then, are appellants damaged?"

Page sought to show that a narrow strip of his land abutting upon the road would be depreciated by reason of the annoyance caused by the road, claiming that to take into consideration the effect of the improvement on all of his property was deducting benefits from damages, contrary to Section 9, and the court said they could not yield to this view because the jury were required to assess the damages to the entire tract by reason of the construction and operation of the road. And further stated, on page 328:

> "It is admitted that any mere general and public benefit or increase in value received by the land in common with other lands in the neighborhood is not to be taken into consideration in estimating compensation, and it is claimed that receiving and considering evidence as to the effect of the crossng was an infringement of this rule, because the advantage of the crossing was not confined to the tract of land in question, but extended also to some other adjacent tracts, but the testimony showed the beneficial effect of the crossing to be so limited in extent that the fact of its not being confined to this tract did not, we think, deprive the crossing of the character of a local and peculiar benefit to this land."

The court then refers approvingly to *Hayes* v. *Railroad,* 54 Illinois 373, decided under the 1852 Act.

The next case, decided at the same term, was that of *Eberhart* v. *Railroad Company,* 70 Illinois 347. The opinion in this case was very short, and the

proceeding was on a petition to condemn a right of way. The court say that the same questions arising here are those in the Page and Francis cases, and that it would not be profitable to discuss them now, and add (page 349):

> "It may not be improper to say that in that case (Francis case) the chief justice expressed his opinion that the constitution contemplates when property is not taken the damages must be actual, real and present damage to the property, before they can be allowed."

We pass over the case of *Railroad* v. *Stein*, 75 Illinois 41, because there is no discussion in that case of Section 9, or of special and general benefits, the case being reversed because the verdict of the jury was palpably against the weight of the evidence.

We next come to the case of *Keithsburg* v. *Henry*, 79 Illinois 290. This is the case so strongly relied upon by counsel, and which, if it was contrary to the prevailing rule in Illinois, was especially repudiated in the Stickney case, in the statement that it was the only case out of line with a long line of decisions on the subject heretofore announced.

A careful examination of this Keithsburg case does not indicate that it announces any different rule from the general trend in the decisions, the court especially saying (page 294):

> "In this case there is no claim that there are special benefits conferred upon appellee's property, not common to other property, hence we express no opinion as to the rule in such case."

In this Keithsburg case, the railroad company sought to show that, notwithstanding the damage

done, the owner had received benefits or advantages that should be deducted; but, as the court said:

> "There was no claim that there were special benefits conferred,"

and therefore, following the wording of the proviso of Section 9, the court held that evidence of these general benefits could not be introduced.

When carefully examined in the light of the particular facts which were present in that case, we do not believe that the Keithsburg case is necessarily out of line with the other decisions of the Illinois Supreme Court:

The cases of

Railroad Co. v. *Haller*, 82 Ill. 208,
City of Elgin v. *Eaton*, 83 Ill. 535,
Hyde Park v. *Dunham*, 85 Ill. 569,
R. R. Co. v. *Hall*, 90 Illinois 42,

all distinctly affirm and follow the doctrine of the Francis and Page cases.

In the next case, that of *Railroad* v. *Kirby*, 104 Ill. 345, while there was no discussion of the question of special and general benefits, as the court said in the Stickney case, it is evident that the view taken was that an instruction stating that the jury should not consider any general benefit which the road might be in making a better market or convenience of travel, was proper as excluding those general benefits which flow to the public generally, and not such as would appreciate the market value of the particular tract of land.

In the next case, that of *McReynolds* v. *R. R.*, 106 Ill. 152, exception was taken to an instruction telling the jury that, if by the construction of the

railroad the lands would be specially benefited to the extent of or greater than they would have been damaged, then the jury would find only for the compensation of the strips of land actually taken, because special benefits were not defined. The court said (page 158):

> "The fault found with it is in respect of special benefits in not limiting them to such as are not common to other property."

The next case, *Railroad* v. *Blake*, 116 Ill. 163, which was another condemnation suit in which 50 feet off of one side of a lot was sought to be taken for a right of way, the only mention of general or special benefits is on page 169, where it is said:

> "The instruction complained of is as follows: 'Under the law of this state, no benefits or advantages which may accrue to lands or property in common with all other property along the line of proposed railroad, by reason of the construction and operation of such railroad, can be lawfully set off against or deducted from a just compensation for the value of the property taken and damaged by such proposed railroad, as the same may appear from the evidence.'"

And the court say (page 170):

> "In *Page* v. *C. M. & St. P.*, 70 Ill. 324, an instruction substantially the same as this was approved. The only objection offered to it is that it is not expressly limited to the value of the property taken. We think this is hypocritical and affords no ground for reversal."

We fail to see anything in this case which supports counsel's contention as to definition by the Illinois Supreme Court of "Benefits or Advantages," as contended for by him.

Following this were the cases of *Cemetery* v. *Rail-*

road, 121 Ill. 199, in which the jury were instructed that the total compensation and damages to which the defendant was entitled must not exceed the difference between the fair market value of the whole land before the taking and the fair market value of what remained after the taking of a part by the railroad. The court said, page 204:

> "It is contended that this instructed the jury to deduct any benefits which the railroad might cause to the remainder of the land from the value of the strip taken. We have held that it is proper to consider special benefits to the property claimed to be damaged but not taken for the purpose of reducing or rather to extent of special benefits of showing there are no damages." (Citing the Page, Francis, Hall and McReynolds cases, *supra.*)

The case of *Railroad* v. *Bowman,* 122 Ill. 595, which arose on a question of whether the damages found by the jury were excessive and made up of improper elements. There was no contention by either counsel relating to special benefits or general benefits. The court said, page 601:

> "If the land not taken would be depreciated in value by the construction and operation of the proposed railroad, the measure of damages would be the difference in the fair market value before the construction of the road and after its construction." (Citing the Francis, Page, Eberhart and Hall cases, *supra.*)

The case of *Kiernan* v. *Railroad,* 123 Ill. 188, the objection here raised being that one of the instructions submitted to the consideration of the jury, raised the question of what are remote, imaginary, uncertain or speculative damages and what not. The court said the instruction was proper because it de-

fined what elements should be considered. The instruction, found on page 196, is as follows:

> "In assessing the damages to the market value of the property not taken, you should not take into consideration anything as an element of damages which is remote, or imaginary, or uncertain, or speculative, even though mentioned or testified about by witnesses; but the only elements which you should take into consideration as tending to reduce the market value, are those which are appreciable and substantial, and which will actually lessen the market value of said property."

His next case is *Harwood* v. *Bloomington*, 124 Ill. 48. This was a condemnation proceeding by a city for a street. The opinion is a little over a page long. The court say that they are not asked to review the decision on a question of fact, but that in arriving at the amount of damage, evidence was admitted of special benefits accruing to that part of the lot not taken, by reason of the opening of the street, and that this is the error relied upon to reverse the judgment. And they say that the owner is entitled to the value of the land actually taken, without regard to any supposed benefits, and state (page 50):

> "But where the owner interposes a claim for damages to that portion of the land not taken, in consequence of the improvement, if the land not taken has received special benefits, benefits not common to other property, such benefits may be considered in arriving at the amount of damage the owner may have sustained to his property not taken." * * *

The court then goes on to say that the rule as announced is conceded to be the law under the Emi-

nent Domain Statute, and held that that statute applies to the case, although it was contended that under the Act in relation to Cities, Villages and Towns, a different rule should prevail.

When plaintiff in error bought his property the law of Illinois as expressed by the Supreme Court of the state was as outlined above. Counsel for plaintiff in error says that the proper consideration of a portion of those cases, which he cites in his brief and which are the following:

State v. *Evans;*
Keithsburg v. *Henry;*
Railroad v. *Kirby;*
McReynolds v. *Railroad;*
Railroad v. *Blake;* and
Harwood v. *Bloomington,*

show the consistent adherence in Illinois to the view that local market benefits giving an enhanced value to the land affected by the improvement are excluded. We submit that even a cursory reading of these cases shows that quite the contrary is true; that the court has consistently held that where an improvement causes a distinct added value to the property not taken, it is specially benefited and that though other property contiguous to the improvement is also enhanced in value, it is also specially benefited; and that the benefits or advantages accruing to the property affected which are to be excluded are those general benefits flowing to the community and all the property affected as a whole by reason of the improvements which are of speculative and intangible nature. And this is clearly shown in the *Keithburg* v. *Henry* case, *supra,* where the railroad sought to

introduce evidence showing the general benefits and the court held that such evidence could not be introduced by reason of Section 9 and its evident plain meaning. (Page 293.)

In 1887, two years before plaintiff in error bought his property, this court had under consideration the state of the law in Illinois under the added words "or damaged," as added to the Constitution of 1870, as to what was just compensation for property damaged under the Eminent Domain Law of Illinois, in the case of *Chicago* v. *Taylor,* 125 U. S. 161, where this court affirmed the lower court's charge to the jury in which was said (page 169):

> "The scope of the charge is fairly indicated in the following extract: 'The real question is, has the value of this property been diminished by the construction of this viaduct?' " etc.

Does the Stickney or any subsequent case announce anything different?

The plaintiff in error bought his property in 1889 and shortly thereafter the cause of *Railroad* v. *Aldrich,* 134 Ill. 9, was decided and we quote from what the court says in that case on page 16:

> "Objection is made to the defendant's fifth instruction, which told the jury that, in estimating the damages to the defendant's land not taken, they should consider the railroad as running only through his farm, and should not consider any general benefits which the road might occasion by making a better market, or by affording conveniences for travel; that it would not be proper for the jury to take into consideration such benefits as the defendant might enjoy in common with the owners of other lands through which the road might run, but only such as would result to the defendant over and above such common benefits.

The rule laid down by this instruction that general benefits which the defendant will enjoy in common with other land owners, or with the public, should not be taken into account is not questioned, but fault is found with the direction to the jury to consider the railroad as though it only ran through the defendant's farm. We can not see how this direction, when taken in connection with the residue of the instruction and the proposition of law intended to be stated and illustrated, could have been in any degree prejudicial to the railroad company. So long as the benefits which the defendant will share with the public were to be excluded, it was by no means illogical to view the railroad, so far as the question of damages to the defendant's farm was concerned, as a structure local and limited to said farm. The general benefits arising from the construction and operation of the road, and which the defendant will share in common with others, will grow out of the fact that the road is not limited in its extent to one locality, but is to connect and form a commercial highway between points distant from each other. The instruction to the jury to consider the road only as running through the defendant's farm was manifestly given for the purpose of eliminating from their minds all consideration of those general or commercial advantages which will flow to the public from the construction of the road, but which should in no way influence the assessment of damages. The suggestion that the jury were likely to be misled into the supposition that they were to assess damages upon the theory that engines and trains of cars were to be continually passing to and fro over said farm is far-fetched and improbable."

That the Supreme Court of Illinois has been consistent in its decisions and fully recognized the importance of Section 9 and its interpretation of the meaning of the proviso of that section, the case of

Washington Ice Co. v. *Chicago,* 147 Ill. 327, is a good example. That case was a condemnation suit by the city for right of way for a street over land which was part of a marshy tract which had almost no access to the city theretofore.

The city sought to show that upon the basis of opening the street, access would be given to all parts of the land from the west and the witnesses for the city expressly took benefits which might accrue therefrom into consideration in giving their opinion as to the damage. There was no showing that the new street was contemplated being built nor was there any showing of its width, grade, cost or any other items in connection with it and the court held that these benefits were under these conditions but general, speculative and imaginary because there was no presumption that the city would make the improvement and the street might not ever be put through and they said, p. 331:

> "What possible basis is laid for the estimation of these benefits? In the evidence there was nothing, if it be conceded that would have been sufficient, tending to show the manner in which the improvement to the street was proposed to be made. * * * The mere paper opening the street, without improvements so as to make it available, aside from not being the basis on which the case was tried, could be of little practical benefit under the existing conditions. * * * (*333*). Private property cannot be damaged for public use without just compensation, and while as before seen, damages to the property not taken may be set off by *special benefits* accruing from the improvement, the benefits must be *real and not chimerical,* otherwise the constitutional safeguard is rendered of no avail. * * *"

It will be seen that the benefits testified to were based upon an assumption that the city would construct a street after it had the right of way, as to which the court said (p. 334):

> "No such presumption arises, where the improvement has not been and may never be ordered to be made."

Therefore, the court, in line with all the previous decisions, held, the benefits being general, intangible and speculative were barred by said Section 9, as had been held in the *Keithsburg* v. *Henry* case.

And following these two cases comes the much discussed Stickney case, found in 150 Ill. 362, in which case the Supreme Court reviewed all the decisions prior to 1894 and said, p. 382:

> "By a practically unbroken line of decisions in this State it is well settled that the test, under the present statute, as to whether land not taken is damaged, is the effect of the improvement upon the value of the land. Under the rule, land is said to be damaged only when there is a diminution in its value,—a depreciation in its price or worth,—and the compensation required to be made is the amount of depreciation or diminution in value occasioned by the construction and operation of the railroad or other improvement. Special benefits are such benefits flowing from the proposed public work as appreciably enhance the value of the particular tract of land alleged to be benefited. As already said, the fact that other property in the vicinity is likewise increased in value from the same cause,—that is, also specially benefited by the improvement,—furnishes no excuse for excluding the consideration of special benefits to the particular property in determining whether it has been damaged or not, and if it has, the extent of the depreciation in value. (*Wilson* v. *Board of Trustees, supra;*

Bohm et al. v. *Metropolitan Elevated Railway Co.*, 129 N. Y. 576; *Rigney* v. *Chicago*, 102 Ill. 64.) On the one hand, the damages must be real and substantial; on the other, the benefits must be such as affect the market value or use of the land, and such as are capable of measurement and computation. Hence, all imaginary and merely speculative damages or benefits are excluded from consideration. The consideration of such benefits as tend specifically to enhance the value of the particular property is not setting off benefits against the damage to the property, but is the simple ascertainment of whether the land has been in fact depreciated in price or worth,—that is, whether loss or damage has resulted to the owner,—for if his property is of the same value after as before the improvement he has sustained no loss. If he has lost nothing,—if his property has not been depreciated in price or value,—it is not damages, within the meaning of the constitution, and there can be no recovery. There can be no damage to property without pecuniary loss or injury which lessens its value."

The court also stated, page 370:

"If property is enhanced in value by reason of the improvement, as distinguished from the general benefits to the whole community at large, it is said to be specially benefited, and is to be assessed for the special benefits, notwithstanding every other piece of property upon or near the improvement may be, to a greater or less degree, likewise specially benefited."

The court then enters into a lengthy discussion of what are the so-called general benefits which are not to be deducted, and said that keeping a distinction between special and general benefits in view, it would be found that the numerous cases in this state, perhaps with a single exception, are in line.

Without taking up the cases following the Stickney case specifically as they are referred to in the opinion in the Brand case, we repeat again the language of the court in the Brand case:

> "The conflict between the decisions and the decisions of other states relied upon by appellant, is not so much as to the rule of law as it is to the application of the rule."

III.

WHEN PARTIES HAVE BEEN REGULARLY HEARD IN THE REGULAR COURSE OF JUDICIAL PROCEEDINGS, AN ERRONEOUS DECISION OF A STATE COURT DOES NOT DEPRIVE THE UNSUCCESSFUL PARTY OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW. THE STATUTE NOT BEING ATTACKED FOR UNCONSTITUTIONALITY, THIS COURT WILL NOT DISTURB THE STATE SUPREME COURT'S INTERPRETATION OF THAT STATUTE, NOR HARMONIZE ITS DECISIONS IF THEY ARE CONFLICTING.

There is no claim by counsel for plaintiff in error that Section 9 of the Eminent Domain Act of Illinois, or any part thereof, offends against the constitution of the State of Illinois or the Constitution of the United States, and this court has repeatedly held that in such case the rights of the parties depend entirely upon the construction of the statute given it by the Supreme Court of the state.

This matter was before this court in the recent case of *Willoughby* v. *City of Chicago*, decided at the October, 1914, term of this court. That case is very nearly like the case at bar, in the contentions made in this court, and this court say:

> "The question whether it could have been levied if the land had not been sold depended upon the construction of state statutes, as to which we follow the decision of the state court. Even if the court had overruled earlier decisions, it would have interfered with no vested rights of the plaintiff in error."

In support thereof, the court cites *Sauer* v. *New York*, 206 U. S. 536, in which case the court said (page 545):

"But as has been said, we are not concerned primarily with the correctness of the rule adopted by the Court of Appeals of New York and its conformity with authority. This court does not hold the relation to the controversy between these parties which the Court of Appeals of New York had. It was the duty of that court to ascertain, declare and apply the law of New York, and its determination of that law is conclusive upon this court. This court is not made, by the laws passed in pursuance of the constitution, a court of appeal from the highest courts of the states, except to a very limited extent, and for a precisely defined purpose. The limitation upon the power of this court in the review of the decisions of the courts of the states, though elementary and fundamental, is not infrequently overlooked at the bar, and unless it is kept steadily in mind much confusion of thought and argument result."

The court distinguished this case from *Muhlker* v. *Railway Co.*, 197 United States 544, and pointed out the same difference between the Sauer case and the Muhlker case as exists on the record in the case at bar, between it and the Muhlker case.

On the question of the right of plaintiff in error to have this court act as a court of appeal in this case, we think the language of this court in the *Sauer case*, page 548, is directly in point:

"The rights of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the states, and the decisions have been conflicting and often in the same state irreconcilable in principle; the courts have modified or overruled their own decisions, and each state has in the end fixed and limited by legislation or judicial decision, the rights of abutting property owners, in accordance with its own view of the law and public policy. As

has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions, nor to reduce the law of the various states to a uniform rule which it shall announce and impose."

In *Moore* v. *Electrical Co.*, 234 U. S. 619, this court said (page 624):

"It has been many times decided that a writ of error will not lie from this court to a state court under paragraph 709, revised statutes (U. S. Comp. Stat. 1901, p. 575), on the ground that the obligation of a contract has been impaired by a change in the decision of the court in respect to the meaning and scope of a statute, the validity of which has not been denied. 'In order to come within the provision of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state, and not by a decision of its judicial department only. The appellate jurisdiction of this court, upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court."

Central Land Co. v. *Laidley*, 159 U. S. 103.

In the case of *Morley* v. *Lake Shore Ry. Co.*, 146 U. S. 162, at page 166, this court said:

"In *Louisiana* v. *Pilsbury*, 105 U. S. 278, 294, this court, speaking by Mr. Justice Field, says: 'Whether such a construction (by judicial decisions upon a clause of the state constitution) was a sound one, is not an open question. * * *

The exposition given by the highest tribunal of the state must be taken as correct so far as contracts made under the act are concerned. * * * The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two states, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it.' 'The rule of construction adopted by the highest court of the state, in construing their own constitution, and one of their own statutes in a case not involving any question re-examinable in this court under the twenty-fifth section of the judiciary act, must be regarded as conclusive in this court.'

Provident Institution v. *Massachusetts*, 6 Wall, 611, 630: 'The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text.'

Leffingwell v. *Warren*, 2 Black, 599, 603. 'The meaning of a state statute, declared by the highest court of a state, is conclusive upon this court.'

Randall v. *Brigham*, 7 Wall, 523, 541. 'If, then, the law as enacted by the legislature, and construed by the state judiciary, will be the law of the state, it follows that, as to the proper construction of the statute and as to what should be regarded as among its terms, no federal question could arise. The most that could be claimed would be that, although the statute of the state was unobjectionable, yet the state court had erroneously construed it. This would constitute a purely judicial error, involving no question of the validity of the law; which latter question alone is, by the plainest possible terms of the

constitution and judiciary act, subject to investigation here.' "

We submit that the writ of error should be dismissed or the judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

ADDISON L. GARDNER,
RANDALL W. BURNS,
FRANCIS W. WALKER.

ROGER L. FOOTE,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1913.

No. 268.

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Petitioners,

vs.

THE UNION ELEVATED RAILROAD COMPANY, THE LAKE STREET ELEVATED RAILROAD COMPANY, THE SOUTH SIDE ELEVATED RAILROAD COMPANY, THE NORTHWESTERN ELEVATED RAILROAD COMPANY, and THE METROPOLITAN WEST SIDE ELEVATED RAILROAD COMPANY,

Respondents.

BRIEF AND ARGUMENT FOR RESPONDENTS.

ADDISON L. GARDNER,
RANDALL W. BURNS,
FRANCIS W. WALKER,
For Respondents.

ROGER L. FOOTE,
Of Counsel.

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BRIEF AND ARGUMENT FOR RESPONDENTS.

FOREWORD.

Before proceeding to answer counsel for plaintiffs in error's argument we wish first to point out certain errors, more or less important, which appear in their brief in certain statements of the law and facts.

Plaintiffs' brief, page 3. The statement is: "The case is an action in Eminent Domain." This is not so and is so admitted on page 10. This is of im-

portance only as tending to confuse the court, as there are distinctions in Illinois between Eminent Domain cases under the statute and cases for damages by abutters, and the section of the statute, the construction of which plaintiffs in error rely on to get into this court, is in the Eminent Domain Act. We treat of this more fully under Point II of this brief.

Plaintiffs' brief, page 7. The action is not an Eminent Domain proceeding.

Plaintiffs' brief, page 9. When property is damaged merely, the corporation is not required to file a petition to condemn, and the condemnation statutes do not apply.

Plaintiffs' brief, page 11. There is a special act in relation to benefits and damages in the case of local improvements. *Harwood* v. *Bloomington* specifically points this out.

Plaintiffs' brief, page 15, 4th paragraph. We find nothing in the evidence about any panic or boom, and this paragraph is not based on any facts shown in the evidence. (P. R., 62.)

Plaintiffs' brief, page 15, 3rd paragraph. Juries are not supposed to infer, and there was no evidence of a definite loss of rents due to the construction and operation of defendant's railroad.

Plaintiffs' brief, page 15, paragraph 5. There was no evidence offered as to values on Michigan avenue or State street *after* the loop had been built. This offer of evidence was confined to values before only. (P. R., 55.)

Plaintiffs' brief, page 15, last paragraph. There was no attempt to show the value of property on

State street or Michigan avenue *after* the construction of the loop. Counsel's statement to the court was not followed by any question. (P. R., 55.)

Plaintiffs' brief, page 16. The reference to business boom and general advance is outside the evidence. There is nothing in the evidence as to whether there was a station in front of this property.

Plaintiffs' brief, page 17, top of page. We do not know from what the quotation as to the jury's assumption is taken. There was no evidence as to any interference with ingress or egress. The evidence was that two loaded trucks could with difficulty go abreast between the posts and curb; the distance between posts and curb is twenty feet. (47.)

Plaintiffs' brief, page 17, No. 5. Counsel failed to add the important words, "There is no evidence of lack of appreciation which depended upon the erection of the structure, etc."

Plaintiffs' brief, page 18, first line. There is no evidence as to obstruction of *access to* the property. (P. R., 47.)

Plaintiffs' brief, pages 19, 23. There was no direct evidence of physical or substantial damage. There were some statements of physical facts made by the one witness. (P. R., 46-47.)

Plaintiffs' brief, page 23, last of paragraph No. 4. There was no direct evidence before the jury of such substantial damages, as stated by counsel.

On the Motion to Dismiss or Affirm.

In our motion to dismiss and argument thereon we recited for the purpose of placing in counsel's own words his claims before this court and tried to

show there was no evidence of any damage in the record even on the theory of the set-off of benefits.

We did challenge counsel "to point out wherein it was sought to show by the witness that the construction and operation of the railroad in the street in front of the property conferred any benefit or advantage on the property which could be in any way estimated so as to be eliminated from consideration in arriving at the amount of just compensation which should have been awarded." We take it the argument (Plffs. Brief, pp. 33-38) is in answer to that challenge. It is there said: "The record is full of evidence that the defendants here claimed that there was such benefit." (Plffs. Brief, p. 33.) The defendants offered no evidence and this does not meet the question. It is further said the trial court held in effect there was, or its holding of necessity implied there was such evidence. (Plffs. Brief, p. 33.) There certainly is no basis for this deduction and we fail to see how it is reached by any process of logic. The final statement is that "they (the plaintiffs) claim it will be presumed that there was at least some benefit." (Plffs. Brief, p. 33.)

Counsel then state plaintiffs proved a loss in rents, from which the jury might infer a loss in value. There was no proof or evidence of loss in rents by reason of the construction and operation of defendant's railroad.

The testimony was that one floor rented for $300 a month in 1898 when the same space rented for $350 a month in 1897, but no reason was assigned for this apparent decrease, and it as well as the vacancy of the floors above might have been due

to various causes having nothing to do with defendant's railroad. May a jury base a verdict on inferences only, as to damage?

Plaintiffs say they also proved actual physical interference with the use of the premises, from which also the jury *must* (this time) have inferred damages. There was testimony as to noise, some smoke and dirt, etc., but the witness who testified to these matters did not himself infer any damage therefrom, and on what theory should the jury have done so provided they are allowed in this case to deal in inferences? Counsel goes on to speak of what might have been, but the sum and substance seems to be that the jury should have cast about in the imagination, as the poet is said to do in a fine frenzy, to find something to hang a verdict on. We hardly believe the time has come when a jury is to be allowed as it were to pick from the air that upon which it shall base its judgment as to the amount of damages to be awarded.

We do not fully grasp the force of the remainder of counsel's statements about waivers, concessions, proven damages, etc.

We do, however, seem to grasp an idea to the effect that in counsel's opinion the construction and operation of the railroad is the making of an improvement and hence benefits of necessity follow to the community served. The value being the same before as after, this benefit must have equalled the damage done, and therefore that damage should be allowed them, but as to what this unknown quantity of benefit and damage which equalled each other

was in amount, or how it should be estimated, we are left entirely in the dark.

We do not find any specific objections to our third grounds for our motion to dismiss discussed, but we presume they are replied to in the general argument in the brief and we, therefore, treat them no further here.

General Answer.

What counsel for plaintiff in error is complaining about, if we understand their case, is simply that the rule of law as to the proper method of estimating damages in these abutters cases, as announced by the Illinois Supreme Court, construes a statute in such a way as they claim and try to show, as to in a measure nullify what they claim is its evident plain meaning. But how the discussion of this rule becomes of controlling importance on the record here is not clear to us.

The Supreme Court of Illinois, having wrestled with the rule for some forty years, and having announced that they still feel it best to adhere to the rule as laid down in a long line of their own decisions without exception, barring possibly one—which in reality is no exception—the attempt is now made to inject a federal question on which to hang jurisdiction of this court by announcing these propositions:

1. That the Illinois Supreme Court does not know its own decisions and that prior to the purchase of the property in question by plaintiffs in error the Illinois Supreme Court had construed this statute in one way in announcing the rule for the estima-

tion of such damages and now have announced a totally different rule, construing that statute in an entirely different way, and a way detrimentally affecting plaintiffs in error's property rights. And because of this they are deprived of the equal protection of the laws or there is a violation of a contract obligation.

2. That the *nisi prius* Judge and the Illinois Appellate and Supreme Courts, by their affirmance of his action, took their property without due process of law, because in taking the case from the jury a rule of law was announced and enforced, which deprived them of just compensation for damages inflicted.

Before proceeding further in our argument we wish to say that as a treatise on counsel's own views of what they think the law ought to be, possibly much of their brief is a valuable addition to legal literature on a difficult subject, but as we do not apprehend that this case involves any consideration whatever of the rules of law in states other than Illinois, we shall not burden this court with our own views on this same subject, nor attempt to answer the conclusions reached, except as they pertain to the issue before this court.

Opposing counsel and ourselves certainly do not seem to be able to read the same cases the same way, possibly each have the beam of their clients' interests, but we have the support of the Illinois Supreme Court itself, who seem to read the cases decided by themselves in the same way we do.

POINTS.

I.

THE CONSTRUCTION BY THE ILLINOIS SUPREME COURT OF THE PROVISO TO SECTION 9 OF THE ILLINOIS STATUTE ON EMINENT DOMAIN HAS BEEN UNIFORM.

We do not repeat the citation of cases here, as a full list of the same and our argument thereon is found fully set forth on pages 33 and 34 and 47 to 67 of our printed motion and argument to dismiss or affirm.

We add, however:

Geohegan v. *Union Elev. R. R. Co.*, 266 Ill., 482, 499, and

Sanitary District v. *Boening*, 267 Ill., 118, both decided in February, 1915.

II.

SECTION 9 OF THE ILLINOIS STATUTE ON EMINENT DOMAIN HAS NO APPLICATION TO AN ACTION SUCH AS THE ONE AT BAR, FOR DAMAGES TO PROPERTY, NO PART OF WHICH IS TAKEN AND NO PROPERTY RIGHTS OR CONTRACTUAL OBLIGATIONS ACCRUE TO THE PLAINTIFF BY VIRTUE OF THE PROVISO OF SAID SECTION.

White v. *Met. W. S. El. R. R. Co.*, 154 Ill., 620.

Met. W. S. El. R. R. Co. v. *Johnson*, 159 Ill., 434.

City of Chicago v. *Spoor*, 190 Ill., 340.

Springer v. *City of Chicago*, 135 Ill., 552.

Penn. Mutual Life Ins. Co. v. *Heiss,* 141 Ill., 35.

Met. W. S. El. R. R. Co. v. *Goll,* 100 Ill. App., 323.

City of Chicago v. *McShane,* 102 Ill. App., 239.

III.

TO GIVE THIS COURT JURISDICTION ON THE CLAIM THAT THE STATE HAS PASSED SOME LAW IMPAIRING THE OBLIGATION OF A CONTRACT, A CLEAR AND DEFINITE CONTRACTUAL RELATION MUST EXIST, CAPABLE OF BEING ACCURATELY STATED, AND WHICH EXISTED PRIOR TO THE ENACTMENT OF THE LAW COMPLAINED OF, AS VIOLATING THE CONTRACT OBLIGATION ALLEGED. IN THE CASE AT BAR, THE STATUTE IN QUESTION WAS ENACTED IN 1872; THE PROPERTY WAS NOT PURCHASED UNTIL 1889. IT IS NOT CLAIMED THAT THE STATUTE IS UNCONSTITUTIONAL OR THAT IT IMPAIRS THE OBLIGATION OF ANY CONTRACT. IF THE STATUTE WAS CONSTRUED ONE WAY PRIOR TO 1889 AND A DIFFERENT WAY AFTER 1889, SUCH DIFFERENT CONSTRUCTIONS DO NOT IN ANY WAY IMPAIR THE OBLIGATION OF ANY CONTRACT NOR IS IT A DENIAL OF THE EQUAL PROTECTION OF THE LAW NOR THE TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Muhlker v. *Harlem, etc., R. R.,* 197 U. S., 544.

Willoughby v. *City of Chicago,* decided November 16, 1914, by this court.

Cleveland & Pittsburg R. R. Co. v. *City of Cleveland,* decided November 16, 1914, by this court.

Moore v. *Electrical Co.,* 234 U. S., 619.

Ross v. *Oregon,* 227 U. S., 150-162.

Sauer v. *New York,* 206 U. S., 536.

Backus v. *Fourth Street Union D. Co.,* 169 U. S., 557, 566, 571.

Merchants & Mfgrs. Bank v. *Penn.*, 167 U. S., 461.

Central Land Co. v. *Laidley*, 159 U. S., 103-111-112.

Morley v. *L. S. & M. S. Ry. Co.*, 146 U. S., 162, 166-7.

Head v. *Amoskeag Mfg. Co.*, 113 U. S., 9-26.

Merchant v. *Penn. Ry.*, 153 U. S., 389.

IV.

THE CONTENTION OF COUNSEL FOR PLAINTIFFS IN ERROR THAT THE PEREMPTORY INSTRUCTION OF THE TRIAL COURT TO THE JURY TO FIND THE DEFENDANTS NOT GUILTY WAS BASED UPON A RULE OF LAW CONTRARY TO THE PLAIN MEANING OF THE STATUTE, AND THAT THE RULE OF LAW ANNOUNCED THEREBY TAKES THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, IS NOT FOUNDED ON THE RECORD.

We do not here repeat our statement on this point as it is fully set forth on pages 36-46 in our printed motion and argument to dismiss or affirm.

ARGUMENT.

Point I.

THE CONSTRUCTION BY THE ILLINOIS SUPREME COURT OF THE PROVISO TO SECTION 9 OF THE ILLINOIS STATUTE ON EMINENT DOMAIN HAS ALWAYS BEEN UNIFORM.

Inasmuch as we have argued this question fully in our printed motion and argument thereon to dismiss or affirm, which argument is found on pages 47 to 67 therein, we do not repeat the same here, but we wish to call the attention of the court to the fact that since that argument was written the Illinois Supreme Court has again had this identical question before it in *Geohegan* v. *Union Elev. R. R. Co.*, 266 Ill., 482, in which case on page 499 the court says in referring to the case of *Brand* v. *Union Elevated Railroad Co.* (the case at bar), that they were urged to overrule former decisions, but that after reviewing the previous decisions they had quoted with approval the rule laid down on the question in *Metropolitan W. S. El. R. R. Co.* v. *Stickney*, 150 Ill., 362. In the case of *Sanitary District* v. *Boening*, 267 Ill., 118, on page 124 the court say: "Any benefits which are not conjectural or speculative and which enhance the market value of such property are to be considered as special benefits and not as general benefits. Special benefits do not become general benefits because they are common to other property in the vicinity," citing the *Stickney* and other cases.

Point II.

SECTION 9 OF THE ILLINOIS STATUTE ON EMINENT DOMAIN HAS NO APPLICATION TO AN ACTION SUCH AS THE ONE AT BAR, FOR DAMAGES TO PROPERTY, NO PART OF WHICH IS TAKEN AND NO PROPERTY RIGHTS OR CONTRACTUAL OBLIGATIONS ACCRUE TO THE PLAINTIFF BY VIRTUE OF THE PROVISO OF SAID SECTION.

Section 9 of the Illinois Eminent Domain Statute, which is the section involved in this case, provides also that the

> "jury shall, at the request of either party, go upon the land sought to be taken or damaged, in person, and examine the same," etc.

This provision secures to the parties the right to a view by jury in a condemnation case, and such view is in the nature of evidence, but the Illinois courts have held that an action for damages to abutter's property, no part of which is taken, is an action under the common law and not under the statute, and that there is no right to a view, but the granting thereof rests in the sound discretion of the court, or on agreement of counsel as in this case, and is not evidence, but only to enable the jury to better understand the evidence.

Inasmuch as counsel for plaintiffs in error is laying some stress on the fact that the view permitted in the case at bar was some evidence, it becomes advisable to point out to this court, if this cause is to be considered on its merits, that in the case at bar, being an action for damages, there is no right to appeal to the much complained of Section 9 of the Eminent Domain Statute, which allows a view at the

request of either party as in Eminent Domain proceedings, and a view if allowed is in no way evidence.

This matter has been very carefully considered by the Illinois Supreme Court in many cases, and was thoroughly discussed and decided in the case of *Springer* v. *City of Chicago,* 135 Ill. 552, 561, 566, and in the cases cited under our Point II.

In the case of *Metropolitan W. S. El. R. R. Co.* v. *Goll,* 100 Illinois Appellate, 323-327, which was an action on the case for damages to abutting property, the court points out the distinction made by the Illinois Supreme Court, and which is of controlling importance here, in the following language:

> "We are told by appellee's attorneys that this court has not all nor the most important of the evidence before it upon which the verdict of the jury was based; that 'its most important branch and unquestionably controlling feature was the view which the jury took of the property and the effect which the location, construction and operation of appellant's road had upon the premises, as disclosed by that view.'
>
> "This, however, is not a condemnation case in which such view is specially provided for by statute, and the view of the premises by the jury was not in the nature of evidence. *Vane* v. *City of Evanston,* 150 Ill., 616, was a special assessment case, in which the jury were permitted to view the premises. It is there held that the only proper purpose of the view was as at common law 'simply to enable the jury to understand the issue and apply the evidence. They were not authorized to consider any fact bearing upon the merits of the controversy derived from such view.' *Springer* v. *City of Chicago,* 135 Ill., 552-556, was a suit for damages, caused by construction of a viaduct. It is there held not to be error, in the exercise of

> sound legal discretion, to permit a view of the premises to enable the jury to obtain a better understanding of the issue presented. So in the present case the view of the jury was allowable only for the purpose of giving a better understanding of the case. Such view was not evidence, nor to be treated as in the nature of evidence upon which to base or sustain a verdict. If not supported by the record, we are not authorized to indulge in the presumption that there was evidence outside the record upon which it was based."

This distinction is further clearly pointed out in the case of *White* v. *Metropolitan W. S. El. R. R. Co.*, 154 Ill., 620, which was a condemnation suit under the Eminent Domain Act and in which White sought by cross-petition in the same proceeding to have the damages which he claimed resulted to a tract of land also owned by him, but separated by a public street from the tract, a part of which was taken, also ascertained, and the Illinois Supreme Court, after reviewing the cases, held that he could not have his damages assessed in that proceeding as the damages to that tract were not determined under the Eminent Domain Statutes, but in a proceeding brought as an action at common law for damages.

It has not been settled, as counsel state on page 10 of their brief, that such common law action (like the instant case) is in its essence simply an eminent domain proceeding, and that *all* the rules of evidence, as to damage and compensation, applicable to statutory proceedings are applicable to such common law action.

What was said in the cases cited by counsel for

plaintiff in error was that such an action is in the nature of one kind of condemnation proceeding, in explaining that all damages, past, present and future, may be assessed in one action.

Point III.

TO GIVE THIS COURT JURISDICTION ON THE CLAIM THAT THE STATE HAS PASSED SOME LAW IMPAIRING THE OBLIGATION OF A CONTRACT, A CLEAR AND DEFINITE CONTRACTUAL RELATION MUST EXIST, CAPABLE OF BEING ACCURATELY STATED, AND WHICH EXISTED PRIOR TO THE ENACTMENT OF THE LAW COMPLAINED OF, AS VIOLATING THE CONTRACT OBLIGATION ALLEGED. IN THE CASE AT BAR, THE STATUTE IN QUESTION WAS ENACTED IN 1872; THE PROPERTY WAS NOT PURCHASED UNTIL 1889. IT IS NOT CLAIMED THAT THE STATUTE IS UNCONSTITUTIONAL OR THAT IT IMPAIRS THE OBLIGATION OF ANY CONTRACT. IF THE STATUTE WAS CONSTRUED ONE WAY PRIOR TO 1889 AND A DIFFERENT WAY AFTER 1889, SUCH DIFFERENT CONSTRUCTIONS DO NOT IN ANY WAY IMPAIR THE OBLIGATION OF ANY CONTRACT NOR IS IT A DENIAL OF THE EQUAL PROTECTION OF THE LAW OR DEPRIVE THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

In addition to the argument which we make under this general heading in our printed motion and argument to dismiss or affirm, which is found on pages 68 to 72 therein, we direct the court's attention specifically to the language quoted in *Ross* v. *Oregon*, 227 U. S. 150, page 162, from the case of *Commercial Bank* v. *Buckingham's Executors*, 5 Howe, 317:

> "It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretense that their judg-

> ments have impaired the obligations of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by the judiciary."

And quoting further from the case of *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S., 18, 30, where it was said:

> "In order to come within the provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of the courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals."

And we also direct the court's attention to the language in the case of *Cleveland & Pittsburgh R. R. Co.* v. *City of Cleveland*, decided November 16, 1914, by this court, where it is said:

> "It is equally well settled that an impairment of the obligations of a contract, within the meaning of the Federal Constitution, must be by subsequent legislation and no mere change in judicial decisions will amount to such deprivation."

On the question of the denial of equal protection of the law we also refer the court to the case of *Merchant* v. *Penn. Ry.*, 153 U. S., 380, 389.

Point IV.

THE CONTENTION OF COUNSEL FOR PLAINTIFFS IN ERROR THAT THE PEREMPTORY INSTRUCTION OF THE TRIAL COURT TO THE JURY TO FIND THE DEFENDANTS NOT GUILTY WAS BASED UPON A RULE OF LAW CONTRARY TO THE PLAIN MEANING OF THE STATUTE, AND THAT THE RULE OF LAW ANNOUNCED THEREBY TAKES THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, IS NOT FOUNDED ON THE RECORD.

In addition to our general argument on this subject found in our printed motion to dismiss or affirm, and argument thereon on pages 36 to 46 therein, we wish to direct the court's attention to the contention of counsel for plaintiffs in error that the case should have gone to the jury on the assumption that the facts shown were sufficient to have sustained an award of damages, and that the refusal of the court to submit the case to the jury was based upon such a construction of the law of damages and benefits as amounted to a denial to the plaintiffs of their constitutional guaranties as to just compensation.

The record does not disclose any ruling by the trial court or opinion held by it on the law of damages or benefits as the source or basis of its action in taking the case from the jury. On the contrary, it appears from the record that such action was taken solely on the ground that there was no proof of damage, and being nothing upon which the jury could base an award of damage.

It is elementary that a party asserting damage must prove damage by a preponderance of the evidence, and the damage shown must be capable of

ascertainment in dollars and cents; that damages must be clearly proved and not left to conjecture.

Counsel for plaintiffs in error argue that because certain physical facts were shown, and a loss of rent of one floor, and that other floors were vacant, the jury should have been left to find from those statements damage to the property, in spite of the fact that there was absolutely no showing of any connection between cause and effect, but, on the contrary, it is fair to presume that their only witness testified there was no such connection when he stated the value of the premises was the same immediately after the construction of the road as before. (P. R., 59-60.)

The trial Judge in his opinion (P. R., 109) clearly pointed out the lack of evidence of direct damage or of inferential damage due to lack of appreciation.

Respectfully submitted.

ADDISON L. GARDNER,
RANDALL W. BURNS,
FRANCIS W. WALKER.

ROGER L. FOOTE,
Of Counsel.

itself, in the absence of any direct evidence as to whether any such enhancement exists.

By simply viewing property after the erection of an elevated structure in front of it, a jury cannot, in the absence of any evidence other than that the property is worth more than before the structure was built, ascertain what the market value was either before or just after the erection of the structure.

258 Illinois, 133, affirmed.

THE facts, which involve the right of an abutting property owner to recover damages for depreciation of his property by reason of the erection of an elevated railroad in the street, are stated in the opinion.

Mr. Harry S. Mecartney and *Mr. John S. Miller* for plaintiff in error.

Mr. Roger L. Foote, with whom *Mr. Addison L. Gardner*, *Mr. Randall W. Burne* and *Mr. Francis W. Walker* were on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

By ordinary warranty deed from Calvin F. Rice, dated November 13, 1889, Edwin L. Brand became owner in fee simple of a lot, with five-story building (No. 259), fronting east on Wabash Avenue, described as follows: "The North Twenty-five (25) feet of Lot five (5) in Block seven (7) in Fractional Section Fifteen (15) Addition to Chicago." The record reveals no other facts concerning any rights acquired by the grantee who held possession until his death in 1900; and there is nothing to show how or conditions under which the City obtained and holds the street. Proceeding under a city ordinance the Union Elevated Railroad Company and other defendants during 1896 and 1897 caused construction of a double-track

BRAND *v.* UNION ELEVATED RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 268. Argued May 6, 7, 1915.—Decided June 21, 1915.

Nothing in the Federal Constitution gives any one the right to have the jury instructed that he is entitled to damages for property taken, where the instruction is not based on some evidence or entitles him to damages without proof.

After an elevated railroad had been built in a street, the jury, in a suit brought by an abutting owner, viewed the premises, and the only testimony showed that the property was worth more after, than before, the erection of the structure; *held*, that the owner was not entitled to an instruction that the jury must exclude from their estimate of market value subsequent to the construction any enhancement from the facilities furnished to the property by the structure

elevated railroad along the center of Wabash Avenue (100 feet wide); and since October 3, 1897, have operated the same.

On October 2, 1902, plaintiffs—Brand's executors—commenced this common law action to recover a lump sum for damage consequent upon construction, permanent maintenance and operation of the railroad in front of the above-described premises. After alleging such construction, method of operation, noise, dust, dirt, vibration and other objectionable results the declaration concludes: "All of which said disturbances and injuries and grievances above complained of, have continued from and since, to-wit, said October 3, 1897, hitherto, and have caused and are now causing and will henceforth continue to cause a great and permanent damage and injury to said premises and building and said rights and easements therein, and by means thereof the said real estate has been greatly reduced in market value, to-wit, in the sum of Twenty-five thousand dollars ($25,000).

"And the plaintiffs aver that said defendants became and are bound to make full compensation to plaintiffs for the said loss and damage under the Constitution and Laws of the State of Illinois; but the said defendants, though often requested, have not, nor has any or either of them, paid said loss and damage or any part thereof, but hitherto have wholly neglected and refused and still neglect and refuse to do so, to the damage of said plaintiffs of Twenty-five thousand dollars ($25,000); wherefore they bring this suit."

Twelve years after the road was put into operation and seven after institution of the cause it was brought on for hearing—November, 1909—upon a plea of not guilty. Before the premises were viewed or any evidence taken, plaintiffs' counsel in his opening statement outlining facts and issues said: "They allege and claim that the premises known as No. 259 Wabash Avenue, owned by

Mr. Brand in his lifetime, and this cause of action surviving to them as executors of his estate; that that property has been damaged in its market value by the construction of the Elevated railroad structure in front of the premises for public railroad uses. . . . The law as it will be given to you, as we understand it, is that under the Constitution of Illinois . . . private property shall not be taken or damaged for public use without just compensation, and we sue under that clause of the Constitution and upon the idea, and the basis, as we expect the law to be given to you, that notwithstanding the City Ordinance allowed the construction of the road that that is no bar to our recovery if damages have been in fact sustained. Damages in the eye of the law is damage to the market value of the property, usually arising from some interference with the private enjoyment or use of the property. . . . The theory is that this structure was built for public uses by the companies organized under the Railroad act of Illinois; . . . but it is a railroad in a street and upon a structure which is violative of the ordinary rights of the abutter in the street, unless in some way they can show some particular, special, immediate, well-defined benefit to that property itself. . . . The theory of the law is that so far as public works are concerned, if a damage is created to the property the property owner recovers in one lump sum for the damage, past, present and future. . . . Now we expect the evidence—and your view of the premises will be, as we think, the most important thing in the case—the actual, physical structure and its mode of operation and the noise and racket and pandemonium, as we would call it, that the road makes in front of the premises; the more or less obstruction to light and other inconvenience—some inconvenience of access and egress for wagons, and all that, all affecting the use of the property, and as we think, that will appear to you to be self-evident and the damage

prima facie established; and then it will be for the opposition, if they can in any way show to you that there are any particular special benefits to this property apart from property generally and apart from the general travel convenience which this property had a right to after the road was established."

Without objection, the jury viewed the premises; Brand's title was established by deed from Rice and right of plaintiffs to sue by their letters, etc.; copy of ordinance granting authority for construction of the railroad was put in evidence, and also street sketch showing outline and location of rails, supports, etc. Plaintiffs introduced a single witness, engaged in the real estate business, who had been agent for the property and collector of the rents since prior to the road's construction. He testified concerning the locality, the property, character of improvements, building of the road in 1896–7, operation, noise, dirt, obstruction to light, etc., resulting therefrom and the effect, the rents received, market conditions of lands in Chicago, the advance therein about 1898, etc. He declared the property's market value was $4800 per front foot before and for three years after the construction, and somewhat later increased to $6500. They also endeavored to prove by him values on Michigan Avenue to the east and on State Street to the west, but this was declared inadmissible. On defendants' motion the court directed a verdict of not guilty, stating the following reasons therefor: "Now I agree fully with your [counsel for plaintiffs] contention that the measure of damages is the difference in the value of the property in question with the structure and that without the structure. But how is that measured? What is the basis of measure of those damages? Why, it is the price before the construction and the price immediately afterwards. That is the readiest and most available test of determining whether or not there was damage. If there was testimony here that

without the structure it would be worth so much and with the construction it would be worth so much less, that would be another question from that which is presented here. Your claim is not for depreciation of the value of the land by reason of the structure but because the structure has prevented its appreciation. It is not for deterioration of value but because the value has not advanced. Although the value has not advanced, it has not been proven by the evidence and there is no evidence tending to prove it did not advance by reason of the erection of this structure. *Non constat* that the structure was erected, there may have been many reasons that the value of the property did not advance and the only affirmative evidence in the case is that immediately before the erection of the structure, the price was so much and that for a period of some years afterwards, the price was so much. There is no evidence of depreciation at all. There is no evidence of right of appreciation which depended upon the erection of the structure and therefore I think you have not made out a case."

The judgment of the trial court was affirmed by both the Appellate Court (169 Ill. App. 449) and Supreme Court of Illinois (258 Illinois, 133). The latter in the course of its opinion said (p. 134): "Numerous errors were assigned in the Appellate Court, but counsel for appellants stated in his brief that all of them were withdrawn except those raising the question of the correct rule for assessing damages to property not taken but affected by a public use, and this is the only question discussed in the briefs in this court. . . . [p. 135] The undisputed evidence, therefore, was that the market value of appellants' property was not depreciated by the construction of the road. It is claimed, however, that this was the result of general benefits common to all property in the neighborhood served by the improvement, and that such benefits should not be considered in determining the dam-

ages; that only special benefits, such as are a direct physical improvement to the property, like the draining of a wet, swampy tract of land by the improvement, or building a bridge across a stream running through the land, which enables the owner to enjoy it with greater advantage by reason of the improvement, should be considered in determining whether the property is damaged. Appellants contend that the benefits to their property by reason of the improvement which operated to prevent a decrease in its market value were general benefits; that there were no special benefits, but, on the contrary, the improvement injuriously affected the use of appellants' property by obstructing air and light, by noise and vibration, and by interference with access to their property, and they insist they are entitled to recover the damage thus resulting without any reference to the other benefits that may have resulted from the improvement. This question is not a new one in this State. Since the adoption of our present constitution [1870] and the passage of the Eminent Domain act [1872] the question has been passed upon by this court a great many times. . . . In all three of these cases it was held the true measure of compensation for land not taken by the improvement was the difference between what the property would have sold for unaffected by the improvement, and what it would sell for as affected by it. . . . [p. 136] The rule announced in those cases has, with one exception, been followed in subsequent cases, down to *Metropolitan West Side Elevated Railway Company* v. *Stickney* [1894], 150 Illinois, 362, . . . [in which] "the court reviews all its previous decisions since the adoption of the constitution of 1870 and sums up its conclusions in the following language: 'It therefore follows that every element arising from the construction and operation of the railroad or other public improvement which in an appreciable degree, capable of ascer-

tainment in dollars and cents, enters into the diminution or increase of the value of the particular property, is proper to be taken into consideration in determining whether there has been damage, and the extent of it.' . . . [p. 137] Appellants insist this decision and others in line with it are wrong; that the rule adopted in this State is contrary to the weight of authority in other States; . . . also, that the rule is in conflict with *Keithsburg and Eastern Railroad Company* v. *Henry*, 79 Illinois, 290, and § 9 of the Eminent Domain act. It is quite true, the decisions in this State upon the question here under consideration are not in harmony with decisions of courts of last resort in some of our sister States, while they are in harmony with the decisions in some States. The conflict between the decisions in this State and the decisions of other States relied upon by appellants is not so much as to a rule of law as it is to the application of the rule. This court is in accord with the cases in other States holding that only special benefits are to be considered in making just compensation for land damaged by but not taken for a public use. The difference is principally as to what are general benefits and what are special benefits. Some courts hold that only those benefits are special which directly and physically operate upon the particular property in a manner different from and not shared in common by other property in the neighborhood and which enable the owner to use it with greater advantage. All other benefits which increase the market value of the particular property in common with other property in the neighborhood are held to be general benefits. This view has not been adopted in this State. . . . [p. 139] The only case in this State that is out of line with the *Stickney Case* and those previously and subsequently decided is *Keithsburg and Eastern Railroad Company* v. *Henry*, *supra*, and that case has not been followed in any sub-

sequent decision. . . . [p. 141] We are not disposed now to enter upon a discussion of the correctness of the rule adhered to for forty years, nor do we feel at liberty, even if we were so inclined, to overrule the large number of decisions that would have to be overruled to justify a reversal of this judgment. The judgment is in harmony with the law in this State, and is therefore affirmed."

The Illinois constitution of 1870 provides—"Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law." The Eminent Domain Act of 1872, chap. 47, Rev. Stat. Ills. 1912, pp. 1099, 1101, provides—(Sec. 1) "That private property shall not be taken or damaged for public use without just compensation; and that in all cases in which compensation is not made by the State in its corporate capacity, such compensation shall be ascertained by a jury, as hereinafter prescribed." (Sec. 9) "Said jury shall . . . go upon the land sought to be taken or damaged, . . . and after hearing the proof offered make their report in writing, . . . so as to clearly set forth and show the compensation ascertained to each person thereto entitled; *Provided*, that no benefits or advantages which may accrue to lands or property affected shall be set off against or deducted from such compensation in any case."

Counsel delimit plaintiffs' present position thus:—

"Appellants withdraw all and every their assignments of error or parts thereof as will leave open upon this record this one question, and will save all their legal and constitutional rights claimed in respect thereto, viz: Assuming that the evidence adduced on the trial and shown in this record tended inevitably and only to show that the property in question was worth as much after the railroad in question had been constructed as before

it was constructed, or as much with the railroad constructed as without it, that the cause should still have gone to the jury. Or, differently worded: That in considering the effect upon the premises in question from the railroad structure in question, the jury must exclude from consideration the enhancement in value of the property in question, if any, resulting from the facilities furnished by the improvement."

The suit is for loss in market value consequent upon erection and operation of the elevated road and is now prosecuted upon the theory that the trial judge erred in not submitting questions of damage to the jury under positive instruction to exclude from market value subsequent to the construction such enhancement, if any, as resulted from facilities furnished by the improvement itself. It was, of course, necessary for the court to determine whether there was any evidence upon which such loss could be found. By merely viewing the property in 1909 the jury could not ascertain its market value either before or just after the road was built, and the only testimony relating thereto showed no change occurred. Neither could the jury tell without evidence what enhancement, if any, resulted from the improvement, and the record discloses none. In the circumstances we think the refusal to give positive direction to exclude from consideration something impossible of ascertainment was clearly right.

What we have said disposes of the essential point presented by the record, and it is unnecessary to consider the broad questions discussed in argument. It may not be contended upon any theory of compensation that the Constitution of the United States gave plaintiffs the right to an instruction not based on some evidence or to damages without proof. The judgment of the court below is

Affirmed.

Mr. Justice Day, dissenting.

I am unable to agree with the opinion of the court in this case. I think its importance justifies a brief statement of the grounds upon which my dissent rests.

In this case there was testimony tending to show that the plaintiffs' property suffered a real and substantial damage by the erection and maintenance of the elevated railroad, and that their property right of ingress and egress was peculiarly and particularly injured by the railroad structure. Such damage was equivalent to a taking of property for a public use and required just compensation to be made for the injury sustained. *Washington Ice Co.* v. *Chicago*, 147 Illinois, 327. There is no question of the real and substantial special injury to the plaintiffs' property, shown by the testimony, and undoubtedly developed by the view of the premises which the jury had under the direction of the court. In this attitude of the case, the jury was instructed that the plaintiff could not recover; the court proceeding upon the theory that there was no testimony tending to show that plaintiffs' property would not sell for as much after the construction of the road as before. The necessary effect of this instruction permitted the jury to consider appreciation in value arising from the general advantage of the structure, not only to the plaintiff, but to others of the public, similarly situated.

In the Supreme Court of Illinois this instruction was sustained upon the theory that the damages to the property might be offset by benefits to the owner although such benefits were shared by all others similarly situated.

This court has more than once held that to take private property for public use without adequate compensation is a deprivation of due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution. *Chicago, Burlington & Quincy R. R.* v. *Chicago*, 166 U. S. 226; *Backus* v. *Fort Street Union Depot Co.*, 169

U. S. 557, 565. It has also held that just compensation, in the constitutional sense, excludes taking into account the supposed benefits that the owner may receive in common with the public from the use to which his property is appropriated. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 326.

Nor is it any answer to say that the proceedings in this case are in accordance with the laws of the State, in a proceeding in which the plaintiffs were allowed to appear and be heard, according to the rules of the local jurisdiction. This contention was made and met by this court in *Chicago, B. & Q. R. R.* v. *Chicago*, 166 U. S. 226, and this court has uniformly held that if the effect of the State's judgment was to permit the taking of property without due process of law, the form by which that result is accomplished is of no moment, and the mere form of the proceeding, even if accompanied by full opportunity to be heard, does not convert such process into due process of law, if the necessary result has been to deprive complainant of his property without just compensation. *Chicago, B. & Q. R. R.* v. *Chicago*, 166 U. S., p. 236, and the cases therein cited; *Fayerweather* v. *Ritch*, 195 U. S. 276, 297. If the effect of the judgment of the state court has been to take the property of the citizen without compensation, no matter what form the procedure has taken, it is violative of the Fourteenth Amendment to the Constitution. If this were not so, the State, by adopting forms of procedure and enforcing laws which operated to take private property without compensation, could deny the citizen the protection which the Fourteenth Amendment was intended to give against all forms of state action.

If the jury were permitted to pay the plaintiffs for their special damage in general benefits enjoyed by the public as well as the plaintiffs, the result is inevitable that the plaintiffs' property was taken without compensation. In

my view, the rule was correctly summarized by Justice Cartwright in his dissenting opinion in this case. In my opinion, he tersely and correctly stated the case in the following words:

"In this case damage was claimed to property by the occupation of a public street with an elevated railroad. There were two classes of rights in the street; the one, the public right to use the street for travel and for that only; the other, the right of the property owner of ingress and egress, use in connection with his property and the appurtenant easements. If there was an obstruction to the public use for travel by the iron pillars, there could be no recovery by the owner for consequent damage, but if his right of access was impeded or interfered with or his property rendered less valuable on account of noise, vibration or other natural consequence of the construction and maintenance of the road, the damage resulting was special to that property. The thing would be a nuisance if there were no authority of law for its construction and operation, and whenever an act is done which without statutory authority would be a nuisance, the owner of property affected by it sustains a special and peculiar damage different from that sustained by the public in general and may have his action for damages resulting from his individual and distinct right. (*Rigney* v. *City of Chicago*, 102 Illinois, 64.) In this case there was a direct physical disturbance of a right enjoyed in connection with the ownership of property, and if there was any damage by reason of the disturbance of the right it was special. Against any such damage general benefits to the public, although enhancing the value of the property in question in common with other property in the vicinity could not be considered. To say that the only test is the market value of the property before and after the improvement, regardless of the causes affecting the value, necessarily charges the owner with benefits which this court has re-

peatedly held could not be done, and makes the owner contribute to a liquidation of special injuries his share of the general benefits derived from the construction and operation of the road."

As the effect of the judgment below was to permit the plaintiffs to be paid for valuable property rights in general benefits, in my opinion it necessarily follows that plaintiffs' property was taken without due process of law, and therefore in violation of the protection afforded by the Fourteenth Amendment.

MR. JUSTICE MCKENNA, MR. JUSTICE LAMAR and MR. JUSTICE PITNEY concur in this dissent.